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SUPREME COURT OF THE UNITED STATES.

No. 808.

OCTOBER TERM, 1894.

JOHN M. YOUNG, DEFENDANT IN ERROR,

vs.

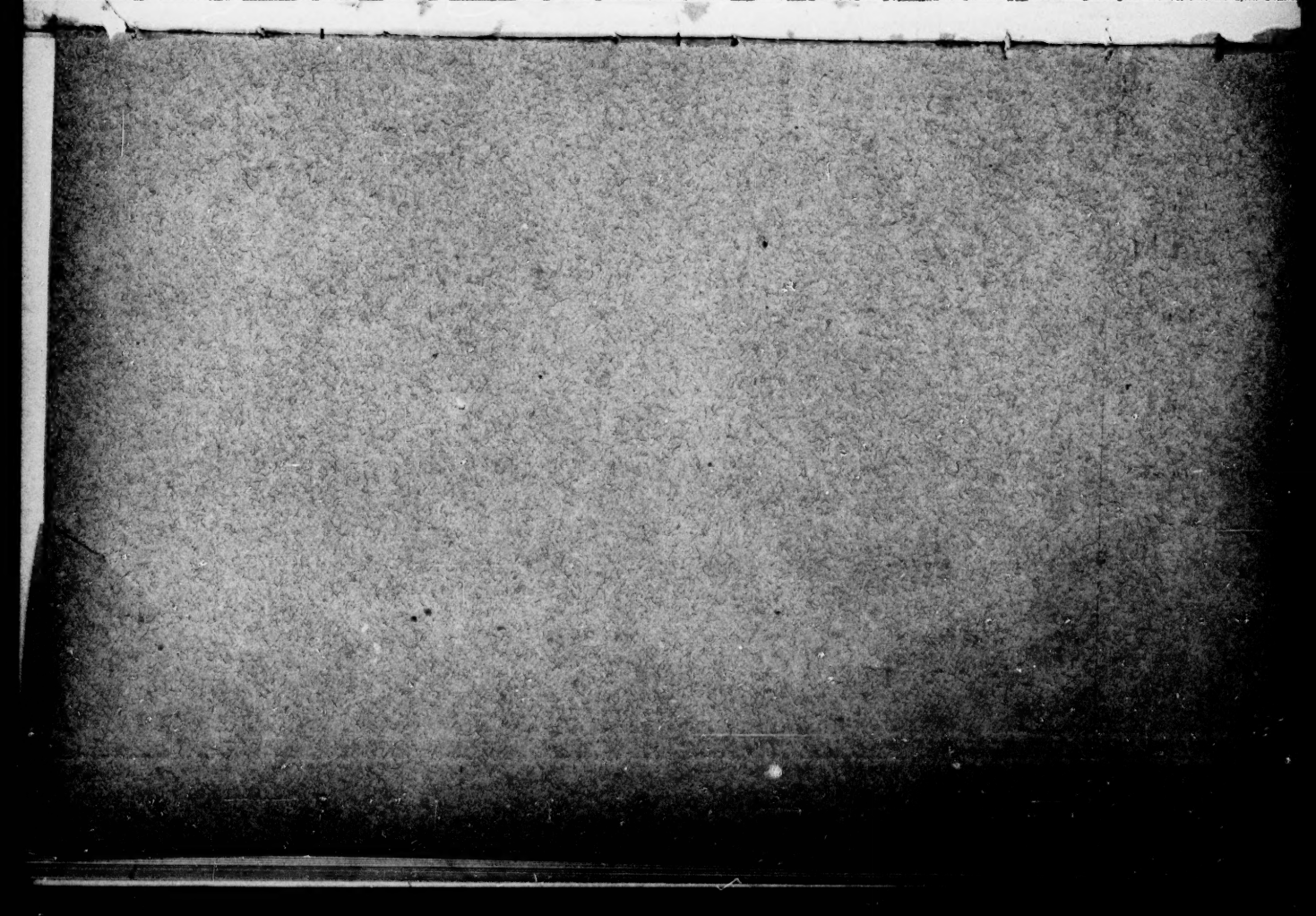
A. T. SCHROEDER AND MARY SCHROEDER,
PLAINTIFFS IN ERROR.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

BRIEF FOR DEFENDANT IN ERROR.

PARLEY L. WILLIAMS,
Counsel for Defendant in Error.

Star Printing Co., 72 S. West Temple.



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STATEMENT OF FACTS.

This action was brought by the appellee to have certain deeds, executed and delivered by the U. S. Marshal of Utah in pursuance of sales upon execution, issued out of the Third District Court of Utah, declared fraudulent and void, and that the appellee, who was the execution debtor, be permitted to redeem the property sold upon execution.

The grounds upon which this relief was asked, were, that the property in question was sold for a grossly inadequate sum, and that said several execution sales were attended with such irregularities as, coupled with the sacrifices of the property, entitled the appellee to the relief sought. The facts of the case may be succinctly stated as follows:

1.—At all the times mentioned in the complaint the appellant A. T. Schroeder and Frank B. Stephens were partners and attorneys-at-law practicing their profession under the firm name of Stephens & Schroeder.

That on the 6th day of March, 1891, Clark, Eldredge & Co., a corporation, obtained judgment by default in said Third District Court against the appellee John M. Young, Henry Goddard and George Goddard for the sum of $1,673.36. together with costs amounting to $30.60.

That the said Stephens & Schroeder were attorneys for the plaintiff Clark, Eldredge & Co., in the suit in which said judgment was obtained.

That the appellee herein was the owner of the undivided one-half of the following described properties, to-wit:

All that part of Lot 2 in Block 70, Plat "A," Salt Lake City survey, commencing 64½ feet west from the northeast corner of said lot 2, thence west 61½ feet, thence south 20 rods, thence east 94½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning.

Also Lot 12 in Block 8, Five Acre Plat "A," Big Field Survey, situated in Salt Lake County, Utah Territory.

That Lydia Y. Merrill was the owner of the remaining undivided one-half in each of said parcels of land.

That the fee thus in the said appellee Young and the said Lydia Y. Merrill was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one-fourth of the income arising from the said properties during their respective lives.

That the said title of the said John M Young and Lydia Y. Merrill in each of said properties, subject to the said life interest in said Sarah Milton Young and Ann Olive Young, was derived from the last will and testament of John Young, deceased, the father of the said John M. Young and Lydia Y. Merrill.

(That the said John M. Young and his co-tenant Lydia

Y. Merrill derived title to said properties in the manner hereinbefore stated, is shown by the decree of distribution made in the matter of the estate of John Young, deceased, in the Probate Court of Salt Lake County, which decree of distribution is found on record pages 32 to 37 inclusive.)

That on April 29th, 1891, an execution was issued in said cause of Clark, Eldredge & Co., against John M. Young et al., directed to the said marshal requiring him, if sufficient personal property could not be found to satisfy said judgment, then to levy upon real estate belonging to the appellee herein and his co-defendants in said action.

That on the 7th day of May, 1891, the said marshal gave notice that he attached and levied on all the right, title, claim and interest of the said John M. Young and his co-defendants in and to the following described property, to-wit:

Beginning 101 feet north and 39½ feet east of the southwest corner of Lot 2, Block 70, Plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning.

(The land thus described, as will be seen by reference to the plat, 9th finding, Record, page 17, and which was introduced in evidence, Record, page 46, was without any means of ingress and egress.)

And also on part of said Lot 2, described as beginning 32½ feet west from the southeast corner thereof, and running thence west 38 feet, thence north 98⅓ feet, thence east 38 feet, thence south 98⅓ feet to place of beginning.

And also on a *part* (it is so described without mentioning which part, Record, page 15, 3rd finding) of said Lot 12, Block 8, Five Acre Plat "A," Big Field survey.

That afterwards on the 25th day of July, 1891, the said

marshal certified that under said writ of execution he had, on June 25, 1891, sold both said pieces of property to John Clark for the sum of one thousand dollars and had paid of said amount $962.36 to the attorneys of said corporation (Stephens & Schroeder), and further returned that there was still due and unpaid on said judgment the sum of $886.90.

That afterwards, on July 28, 1891, an alias execution issued from said Third District Court in said action of Clark, Eldredge & Co. against John M. Young et al., which last mentioned execution was for the full sum of $1673.36 together with $30.50 costs, under which last mentioned execution the said marshal gave notice that he levied upon all the right, title, claim and interest of said John M. Young and his said co-defendants in said action, in and to the following described property, to-wit:

Beginning 64½ feet west of the northeast corner of said Lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to place of beginning; and on August 25, 1891, said marshal certified and returned that under the said last mentioned writ of execution, he sold all the premises last above described to the said defendants Frank B. Stephens and A. T. Schroeder for the sum of $828.70, and certified that the said judgment so obtained by said Clark, Eldredge & Co. was still unsatisfied to the extent of one hundred dollars.

That afterwards, on the 30th day of September, 1891, said marshal made a further return to said last mentioned writ, by which he certified and returned that on the 9th day of September, 1891, he sold all of said Lot 12, Block 8, Five Acre Plat "A," Big Field Survey; and also all that

part of said Lot 2, Block 70, Plat "A," described as follows, to-wit: Beginning 39 feet east and 81 feet north of the southwest corner of said Lot 2, running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning; to the said Frank B. Stephens and A. T. Schroeder, for the sum of one hundred and thirty-six dollars, and that after deducting the costs and expenses of said last levy, amounting to thirty dollars, had paid the balance to the attorneys of said Clark, Eldredge & Co., to-wit: $106, and returned the said writ of execution fully satisfied.

That each and every parcel of said Lot 2, Block 70, Plat "A," so sold under said several writs of execution was a part and portion of that part of said lot 2, to which the said John M. Young derived title under the will of John Young, deceased, as aforesaid.

That the said piece of property so sold to said John Clark was afterwards, and prior to the commencement of this action, conveyed by said Clark by quit claim deed, to the said Frank B. Stephens and A. T. Schroeder; that the said piece of property so sold to said John Clark was bid in at said execution sale by the said Frank B. Stephens for the said John Clark.

That the other portions of said lot 2, so sold under said several writs of execution, and said lot 12, were bid in at said execution sales by the said Frank B. Stephens for himself and the said A. T. Schroeder.

That at none of said execution sales was there any other bidder than the said Frank B. Stephens nor was either of said sales attended by any person other than said Frank B. Stephens and the officer conducting the sale.

That the interest of John M. Young in the properties so sold under said execution was, at the time of the sales thereof, worth at least twenty-six thousand dollars.

That after said several sales on execution had been made and before the time to redeem therefrom had expired, the said Frank B. Stephens informed the said John M. Young, in effect, that the statutory time for redemption would not be insisted upon, and that the said Young believed and relied on such assurance and allowed the period of redemption to elapse without redeeming any of said property from said sales, and that marshal's deeds were given to the purchasers at said sales.

That said Lot 12 had been sold for taxes for the year 1891 and also for the year 1890.

That in the month of April, 1892, the said A. T. Schroeder, after he had obtained the marshal's deed for said Lot 12, was informed that the said John M. Young was about to redeem said Lot 12 from both of said tax sales, and well knew that the said Young was unaware of the fact that said Lot 12 had been sold under execution and yet he permitted the said Young to redeem said property from both tax sales, and purposely concealed from him the fact that said property had been sold under said execution, and that he and his partner, the said Stephens, then held the marshal's deeds therefor.

That prior to the commencement of this action, the said John M. Young offered to pay the said Stephens & Schroeder the full amount of said Clark, Eldredge & Co's judgment, together with interest thereon at the rate of one per cent per month, to compensate the said Stephens & Schroeder liberally for all services for trouble that they had been to in the premises, to give them in addition a bonus of one thousand dollars, and to repay all or any advancements which they might have made on account of the property, with interest thereon, if they would re-convey said properties to the appellee, which offer they refused.

That the said Stephens & Schroeder as attorneys for said Clark, Eldredge & Co., directed the said marshal what property of the said John M. Young to levy upon, under said several writs of execution, and furnished him, the said marshal, with a description of the property to be levied upon under each of said writs, and the said marshal made his several levies in compliance with the directions of said Stephens & Schroeder. That it was the design and purpose of the said Stephens & Schroeder to exhaust all of the property of said appellee John M. Young of whatsoever nature or description, regardless of its value, under the said several writs of execution, and that by and through the irregularities complained of, they accomplished that purpose.

The trial court found that it was to the interest of said Stephens & Schroeder to buy in the appellee's property for as little as possible, and they *so acted* as to obtain said property for the least possible sum to satisfy the Clark Eldredge & Co. judgment and at the same time to obtain all the appellee's property. That said Stephens & Schroeder in order to still more embarrass the appellee requested the collector of taxes of Salt Lake County to allow them, the said Stephens & Schroeder, to bring suit against the appellee to recover taxes owing by him on the part of said lot two, and said Stephens & Schroeder agreed that if the said collector would so consent that they would bring the said suit and make said collection free of cost to said collector, and the said collector thereupon consented, and the said Stephens & Schroeder did bring such suit and did not make any charge therefor against the the said collector. Finding 2, Record, page 14, shows that the suit herein as against Frank B. Stephens and his wife has been satisfactorily settled and that the same has been dismissed as against them.

The appellee, plaintiff below, obtained the relief demanded, and on appeal the case was affirmed.

There is a stipulation filed in this cause in this court, whereby it is agreed that the plaintiffs in error shall serve their brief on or before February 15, 1895, that the defendant in error shall serve his brief on or before April 15, 1895, that said plaintiffs in error shall file their reply brief by June 1, 1895, and further that this cause shall be submitted for decision to this court on briefs on or before June 15, 1895.

ARGUMENT AND AUTHORITIES.

Appellee contends that where there has been a gross sacrifice of property at an execution sale thereof, a court of chancery will not hesitate to set aside the sale, provided it has been attended with irregularities, however slight, especially if such irregularities could have had any tendency to depreciate the value of the property or to prevent its bringing an adequate price; that in this case the property of the appellee Young was recklessly sacrificed, having been sold for less than one-thirteenth of its value; and that the irregularities attending the several sales were numerous and substantial and of such a character as must of necessity have prevented the property selling for anything approaching its value.

POINT 1.

INADEQUACY OF PRICE.

The court below has established the gross inadequacy of price by finding the value of the appellee's interest in said portions of said lot 2 to be at the time of the sale

thereof, at least twenty-five thousand dollars, and his interest in said lot 12 (the five acre lot) to be at least the sum of one thousand dollars, making a total of twenty-six thousand dollars;

(See 25th finding, Rec. page 19.)

and the court found that each parcel was sold for a grossly inadequate price compared with its true value.

(See 20th finding, Rec. page 18.)

POINT II.

The several irregularities complained of will be discussed:

FIRST IRREGULARITY.

Attention is now called to some of the irregularities complained of, any one of which, is sufficient, when taken in connection with the gross inadequacy of price realized, to entitle the appellee to the relief sought in this action. And in the first place it is submitted that the fact that the property sold at some of these execution sales was purchased by Stephens & Schroeder who were the attorneys for the judgment creditor, was itself such an irregularity as, when coupled with the sacrifice of the property shown by the evidence, calls for the cancellation of the deeds.

See Howell vs. Baker, 4 Johnson's Ch., 117, where on page 120 the Chancellor says:

> "The defendant B was one of the attorneys to the execution under which the sheriff sold the land, and it might be a question whether an attorney can in such case, become a purchaser for his own benefit. He is the agent of the plaintiff, and generally has the control of the execution, and may direct the time and place of sale. It is well known that the sheriff receives his instructions from the attorney, and usually follows them, under the general regulations of the statute, in pressing or in postponing the sale, and as to the terms to be prescribed, *and the particular parts of the real*

estate to be selected. (The italics are ours.) It is dangerous to allow a person, who has such a material agency in the sale, the capacity of buying in, on his own account He who is entrusted with the business of others ought not to be allowed to make that business an object of interest to himself. It tends to abuse and corruption. It is upon this principle that the assignees of a bankrupt are not allowed to become purchasers on the sale of the bankrupt's estate. The bringing it to sale, and the time and manner of the sale, are very much in their power. A purchase by the solicitor of the assignees is supposed to be within the reason of prohibition, for he is their agent to direct the sale; and those who have a duty to perform for others, should not, in the discharge of that very duty, deal for themselves." * * * "In Hall vs Hallett, 1 Cox 134, Lord Thurlow observed, that 'No attorney can be permitted to buy in things in course of litigation of which litigation he has the management. This the policy of justice will not endure.'

"But though the rule disqualifying trustees, and particularly solicitors and attorneys, from purchasing at sales brought about through their agency, has strong pretentions to be applied to this very case, I do not perceive it to be incumbent upon me, at present, to decide that point. The purchase by the defendant B was made under special circumstances, which are sufficient, of themselves (and particularly when taken in connection with his character as attorney to the execution), to constitute him a trustee for the parties, whose interests were concerned in the sale."

Further on, page 120, the Chancellor says:

"Indeed, such gross inadequacy of price, when taken in connection with the fact that the sale was on a stormy day, *and that no persons were present but the sheriff and the defendant B,* (the italics are ours) would well warrant an inference of fraud, on any other ground than the one I have taken."

See also Jones et al. vs. Martin, 80 Am. Dec. 643, where, speaking of the purchase by an attorney at a sheriff's sale under execution, of which the attorney had control, it is said:

"* * * Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts."

See Blight's Heirs vs. Tobin, 18 Am. Dec., 219.
Byers vs. Surget, 19 How., 303.

SECOND IRREGULARITY.

The return of the marshal to the first writ issued under the Clark, Eldredge & Co. judgment, shows that on the 25th of June, 1891, the marshal made sale of portions of the property in controversy, from which he realized the sum of $1049.26; that deducting therefrom his fees, commissions and expenses, amounting to the sum of $86.90, he paid the balance $962.36 to the attorneys for the plaintiff in that action (Stephens & Schroeder), and certified that there was still due and unpaid on the execution, the sum of $886.90.

(See 4th Finding, Rec. page 15.)

On the 28th day of July an alias execution was issued for the full amount of the original judgment, viz: $1,673.36 together with $30.50 costs, and upon this alias writ the other levies and sales complained of were made.

(See 6th and 7th Findings, Record page 16.)

This also was an irregularity and one which a court of equity will take hold of to wrest from designing attorneys who manipulate to a large extent the court's process, property obtained at a great sacrifice.

(35 Me. 90.)

In 56 Am. Dec. 690 and note, Glidden vs. Chase, it was held that a levy of execution exceeding by fourteen cents the judgment was void.

It might be that a court of chancery would not set aside

a sale now if that were the only thing to be appealed to, but the settled doctrine is, that even a slight irregularity if coupled with a gross sacrifice, is sufficient to stay the plundering of an execution debtor.

THIRD IRREGULARITY.

Not only was this alias execution issued for an amount nearly double the sum remaining unpaid upon that judgment, but under it the marshal sold, under the direction of Stephens & Schroeder, property for an amount in excess of the amount remaining unpaid on the judgment, including all costs and interest, and collected the excess and paid it over to said Stephens & Schroeder who retained it.

These facts are made manifest from the 11th finding, Rec. page 17, to-wit:

"XI.

"At the time of the last sale, to-wit: September 30th, 1891, there was a balance due Clark, Eldredge & Company of only $25 57, and their judgment had been satisfied except said sum, and to satisfy said balance, property was sold as aforesaid, amounting in all to $136. $106 of which was paid by the United States Marshal to said Stephens & Schroeder.

This is not only an irregularity for which the sale might be set aside, but the levy and the sale being excessive is absolutely void.

Hastings vs. Johnson, 1 Nev. 613.
Patterson vs. Carmal, 13 Am. Dec. 208.
Glidden vs. Chase, 56 Am. Dec. 690.

FOURTH IRREGULARITY.

In the sales made under the several writs of execution of portions of Lot 2, Block 70, Plat "A," it appears that in each instance the levy and sale were upon a specific portion of the plaintiff's interest in said Lot 2; and it is well

settled that an execution sale of a judgment debtor's interest in a specific part of a tract of land owned by him and others as co-tenants, if the title to the entire tract is derived from one and the same source, is void.

Smith vs. Benson, 9 Vt. 138.

Freeman on Co-ten. and Par. Sec. 216.

Note to Smith vs. Huntoon, 23 Am. St. Rep., 651.

The necessary tendency of such a sale is to prevent the property selling at a fair price, because the purchaser at such a sale must realize that when a partition is had, he might be deprived of any and all interest in the property so purchased by him. Under such circumstances of course, no one would be so reckless as to bid anywhere near the value of the interest offered for sale.

FIFTH IRREGULARITY.

One of the parcels or portions of said Lot 2 levied upon and sold under the first writ of execution, is described as follows:

Beginning 101 feet north and 39½ feet east of the southwest corner of said Lot 2, thence east 15½ feet, north 28 feet, west 15½ feet, south 28 feet to beginning.

Reference to the 10th finding, Rec. page 17, will show that the piece of property thus described has no means whatever of access to it except over the lands of other parties. It is needless to say that such a sale must necessarily result in a sacrifice of the property sold.

The descriptions of the several pieces of property to be levied upon under said writs of execution were furnished the marshal by Mr. Stephens, who directed him upon what property to levy.

(See 13th finding, Rec. page 17.)

While Stephens & Schroeder did not have actual knowl-

edge of any other realty owned by appellee when this sale was made, yet they had constructive notice of the conveyance to the appellee and his sister, in which the 15½ feet by 28 feet constituted a part of said lot two; and even if they did not have constructive notice of this conveyance, yet as Mr. Stephens furnished the officer with a description of the small parcel, he or any prudent person would be put on instant inquiry by the circumstances—that there was no ingress or egress, and such a small parcel—to ascertain if there was not other property owned and used in conjunction therewith, and the conveyance that would show title to the part would also show title to the whole. But the actual or assumed ignorance of Stephens & Schroeder may be appreciated by reading the 15th finding, Record, page 17, which finds that *before any sales were made and regardless of value,* it was determined to obtain all the appellee's property, *and that bids were so made as to accomplish, and did accomplish such object.* With such an object in view, and the determination formed to execute it, it would be folly to be wise on the point whether other property was owned or used in conjunction with the 15½ feet by 28 feet; and they had no difficulty in promptly finding the adjoining property when it came to the subsequent sales.

When attorneys are benefited by sales which they have directed, they should be held to a strict accountability.

See Howell vs. Baker, 4 Johns. Ch. 119.

SIXTH IRREGULARITY.

The levy and notice of sale were insufficient in that the property levied upon to be sold was all the right, title, claim and interest of the judgment debtors in and to the

property described, and there was no specification of the interest or its extent, intended to be sold.

(See 18th finding, Rec. page 18.)

This interest might have been the whole, a thousandth part, or nothing; and when attorneys *so acted* and *so bid* as to obtain all the appellee's property regardless of value, they should be held to an extraordinary degree of strictness as to stating accurately what the condition of the thing proposed to be sacrificed is.

See Arms vs. Burt, 1 Vt. 303.

Paine vs. Webster, 1 Vt. 101.

SEVENTH IRREGULARITY.

The sale en masse of several and distinct parcels or lots of land, without first endeavoring to effect a sale of the same separately, is voidable.

2 C. L. Utah, p. 311, Sec. 3436.

Nesbitt vs. Dallam, 28 Am. Dec. 236.

Morris et al., vs. Robey, 73 Ill. 462.

It is obvious that no parcel of the land would or could be sold separately when only Mr. Stephens and the officer were present, because even if offered separately it would not be bid upon, as the previous determination was that, *regardless of value*, the whole of the appellee's property should be sold and that the same should be so bid upon as to accomplish such object, and such object was so accomplished.

The finding on this point merits a careful reading, as parallel action seldom or never appears in a record.

The finding is the 15th, Rec. page 17, to-wit:

"XV.

"Before any of said property was sold, said Stephens, who was

> the sole bidder at each of said sales, formed the intention that regardless of the value of the various pieces of property to be sold and that were sold, that he would leave a balance after each sale so that all the plaintiff's property would be sold and he so bid at the various sales as to accomplish, and did accomplish, said object and purpose."

From the above finding it is apparent that the different sales were not, and were never intended to be, fair sales, and that "regardless of the value he so bid" as to accomplish a dishonest object, and of course an offer on separate parcels was never contemplated, and if made would have been a farce.

See Howell vs. Baker, 4 Johns. Ch. 119.

EIGHTH IRREGULARITY.

It was an irregularity to make three sales and increase the sales by two-thirds, when such sales resulted from an agreement to sacrifice all the appellee's property regardless of its value, and especially when it is found by the court that Stephens & Schroeder *so acted* (32nd finding, Record, pages 20-1) and *so bid* (15th finding, Record page 17) as to bring about this result.

NINTH IRREGULARITY.

Finding 32nd, Record pages 20-1 is:

> "That it was the interest and duty of said attorneys on said execution sales to obtain the highest possible market price for all the said properties while acting for and in behalf of Clark, Eldredge & Company, so that said property should not be sacrificed and so that the said judgment should be fully paid, but the said attorneys in violation of such duty became bidders on said property and bid the same in, and in such capacity it was to their interest, and they so acted to obtain said property for the least possible sum so as to satisfy said judgment and at the same time to sell all the

> property belonging to said John M. Young; and it was to the interest of said attorneys when purchasing said property for themselves to bid the same in for the least possible sum and at the same time realize a sufficient amount to pay the amount due Clark, Eldredge & Company."

Appellants quibble in their brief whether an ultimate fact is here found and thus seek to avoid its persuasive effect.

This is the first time the contention has been made that an ultimate fact was not found, as the appellants' specifications of error will show.

Some of the evidentiary circumstances of the ultimate fact that they *so acted* are:

That the little piece of land without ingress and egress was sold on a description furnished by Mr. Stephens.

That Mr. Schroeder deceived Mr. Van Cott as the agent of the appellee as to the redemption of the 5 acre lot, more particularly referred to hereafter.

The statements made by Mr. Stephens to the appellee that the statutory time to redeem in would not be insisted upon.

By making three sales instead of one, so as to leave a balance after each sale, thus increasing the costs.

By requesting the collector of taxes to allow them, Stephens & Schroeder, to bring suit against the appellee without cost to the collector.

(See 27th finding, Record page 19.)

By the 32nd finding that they *so acted* as to obtain all the appellee's property for an unconscionable consideration.

Without mentioning other circumstances tending to the same result, yet it stands established by the court in the 27th finding that they, Stephens & Schroeder, *so acted* as to accomplish this result.

MATTERS EMPHASIZING THE IRREGULARITIES.

All the foregoing irregularities were directly and intimately connected with the various sales made and show the designed and fraudulent sacrifice of appellee's property; and the following matters emphasize the irregularities heretofore complained of, and demonstrate the intention of Stephens & Schroeder to obtain at all hazards and by whatever means all of appellee's property:

FIRST.

Finding 28th, Record page 19-20 is:

"XXVIII.

"That on or about April 10th, 1892, the plaintiff offered to pay to Frank B. Stephens and A. T. Schroeder the full amount of the judgment obtained by said Clark, Eldredge & Company, together with interest at the rate of one per cent. per month, and also to liberally compensate said attorneys for all services and trouble that they have been to in the premises, and to give them one thousand dollars besides and repay all their advances, with interest, if they would reconvey the said properties to the said plaintiff, but the said Stephens & Schroeder then and there declined and refused so to do; and again after said April 10th, the said plaintiff again made said offer to said attorneys."

Finding 29, Record, page 20, is:

"XXIX.

"That the plaintiff herein is willing and has offered to do full justice and equity in the premises as this court may determine."

Here then is the proof positive of appellee's endeavor to do everything fair and just in the premises, in fact more than the chancellor on the hearing, and more than the Supreme Court of Utah on the appeal, thought ought to be done. But these offers were refused, and from what motive is readily appreciated.

On this point this Court in 19 How., 310-11, speaking through Mr. Justice Daniel, said:

> "Another pregnant proof of the design of the appellant to grasp and retain what no principle of liberality or equity could warrant, is the fact, clearly established, of his refusal after the sale to accept from the appellee, for the redemption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation; and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee."

SECOND.

By requesting the Salt Lake County Collector of taxes to allow them, Stephens & Schroeder, to bring suits for delinquent taxes against the appellee, and that if the Collector would so consent, these suits should be without cost; and such proposition was consummated.

27th finding, Record page 19, is:

> "XXVII.
>
> "Before the time had expired for redeeming from said execution sales, said Stephens & Schroeder requested the collector of taxes of Salt Lake County, Utah Territory, to allow them, the said Stephens & Schroeder, to bring suit against the said plaintiff herein to recover the taxes owing by the said plaintiff for the year 1890 on the part of Lot 2 described in said complaint; and the said Stephens & Schroeder agreed that if the said collector would so consent that they would bring the said suit and make said collection free of cost to said collector, and the said collector thereupon consented; and the said Stephens & Schroeder did bring such suit and did not make any charge therefor against the said collector."

Here is a spectacle of attorneys appreciating their

calling, instead of standing fair in a transaction as common honesty demanded, they were actually scheming to embarass and break down the appellee so that his property might the easier be sacrificed.

THIRD.

Findings 30th and 31st, Rec. page 20, are:

"XXX.

"That on or about April 10, 1892, the said plaintiff, then being unaware that said Lot 12 had been sold on execution sale and that the said Stephens & Schroeder had a marshal's deed therefor, informed the said A. T. Schroeder that he intended to redeem said lot from the tax sale; and afterwards the said plaintiff did so redeem said lot and informed the said Schroeder that such had been done, the plaintiff being unaware that the said Stephens & Schroeder held a marshal's deed therefor; and again on or about April 24th, 1892, the plaintiff still being unaware that the said Stephens & Schroeder held a marshal's deed for said Lot 12, informed the said Schroeder that he, the said plaintiff, intended to redeem the said Lot 12 from a tax sale that had been made therefor for the taxes of 1890, and afterwards the plaintiff did redeem said lot from such tax sale and informed the said Schroeder of that fact, the plaintiff at all said times being unaware of the said Stephens & Schroeder holding a marshal's deed for said lot, and the said Schroeder never at any time informed the said plaintiff that he, the said Schroeder, had obtained a deed for said Lot 12.

"XXXI.

"That said A. T. Schroeder purchased said Lot 12 and obtained a marshal's deed therefor for the benefit of himself and the said Frank B. Stephens, and the said Stephens & Schroeder remained quiet and purposely and intentionally failed to inform the said plaintiff that they had the title to said lot at the time when the said plaintiff was redeeming the same from the said tax sales."

See also the evidence on this point, Record page 26.

No upright man would do as Mr. Schroeder did in this matter; the circumstances imperatively demanded that the purchasers should speak and state the truth. Silence at such a time was fraud, and showed the studied purpose and intent to obtain and hold this valuable property. This Court in a somewhat similar case, 117 U. S., 186-7, by Mr. Justice Bradley said:

> "Considering the amount of the stake to be won, and the overwhelming injury to be inflicted upon an unsuspecting woman, it is difficult to regard with equanimity the proceedings of the defendant, as the year of redemption drew to its close, and after it had terminated. The fact is virtually admitted that he kept up a regular corps of spies to watch her movements whilst she was laying out hundreds of dollars in repairs on the property, in order to find a favorable moment, when she was absent, to take possession of her home; and that he seized such a moment, and did take possession, and removed all her furniture and chattels, even her clothing and private papers, and virtually turned her into the streets. These admitted facts are enough of themselves to show the animus and intent of the defendant. No man with an honest purpose could have done this, whatever aggravation he may have had relating to the payment of his claim. There were other methods to which he could and would have resorted. A piano or a mirror would probably have satisfied his whole claim."

The claim of appellants seems to be that their conduct should be decided by a single act, but a court does not judge a transaction by a single act, but looking over the same as an entirety.

See 1 Bige. on Fraud, pages 146-7.

FOURTH.

Finding 24th Record page 19, is:

"XXIV.

"In December, 1891, after the property described in the findings

> herein and in the said complaint, and constituting a part of Lot 2 and also Lot 12, were sold, and before the time had expired to redeem said property from any such sales, the said plaintiff was told by the defendant Frank B. Stephens that he would not be pushed, and that the statutory time to redeem would not be insisted upon, and the said plaintiff believed and relied on such assurances."

This finding of itself entitles the appellee to set aside the deeds and redeem his property.

In 2 Free. on Ex. Sec. 316 (pages 1078-9), the author says:

> "So, if an agreement is entered into subsequently to the sale, though by parol, the substance of which is the purchaser, or other holder of the certificate of sale, will treat it as a mere security or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute, and not to enforce it in his favor, when it had been the means of lulling him into inaction, would be to pervert it into a cruel and fatal decoy. This the courts will not permit, nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds."

This is another evidence that an intention was formed prior to any of the sales to *so bid* as to obtain all of it as found by the court in the 15th finding, Rec. page 17, and also confirms the 32d finding that Stephens & Schroeder *so acted* as to the appellee's property as to obtain the same at an unconscionable consideration.

All the acts and declarations of Mr. Stephens in connection with these properties are binding upon his partner Mr. Schroeder under the circumstances in evidence (18 Am. Dec. 219, Blight's Heirs vs. Tobin) and the statements of Mr. Stephens were made during the continuance of the partnership and while they were acting together.

The law as applied to the foregoing state of facts is:

Notwithstanding the statutory period for redemption has expired, yet a court of equity will, where there has been a gross sacrifice of the property at execution sale, and the same has been attended by irregularities, interfere and set the sale aside, unless the judgment debtor has been guilty of such unreasonable delay, under all the circumstances of the case, as to amount to legal laches.

In 19 How. 303, Byers vs. Surget, the facts and law are fully set forth and the irregularities there do not approach those in the case at bar. In the course of the opinion the fact that the purchaser directed the officer in selling is severely criticized.

On page 306-7 Justice Daniel says:

> "Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused or even palliated? To the appellant must necessarily be imputed full knowledge of this transaction; he was the attorney for the defendant in the state court, he is shown to have been not only the adviser, but virtually the executor, of every step taken for the enforcement of the judgment of that court; and, as a lawyer, it is reasonable to presume that he must have comprehended the nature and effects of the measures adopted by him, and at his instance."

In that case as in this, it was sought to sustain the sale because it was alleged the proceedings could not be successfully attacked.

On page 308, Justice Daniel says:

> "But with any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves thereof, this court can regularly, as could the Circuit Court, take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes an extensive ground of

> their jurisdiction. The true and intrinsic character of proceedings, as well in courts of law, as in pais, is alike subject to the scrutiny of a court of equity, which will probe, and either sustain or annul them, according to their real character, and as the ends of justice may require."

Also on pages 308-9, reference is made to the power of the attorney to enforce the judgment, and also to the limits of that power.

It was there as here urged that the objections were narrow, technical or groundless, and on that point at page 310, Justice Daniel says:

> "The objections here stated cannot be deemed narrow or technical with reference to a case like the present—a case presenting no claim to favor either in law or in equity; a case in which the respondent was and is bound to pursue the hair line of legal and formal strictness, and from which, if he deviate in never so small a degree, he is doomed to fall.
>
> "The conduct of the defendant, in all that he has done himself, and in all that he has exacted of others, is essentially important in this case as evidence of the *quo animo* with which this transaction was begun, prosecuted, and consummated."

It was there as here insisted that inadequacy of consideration alone cannot amount to proof of fraud; and on that point, at page 311, Justice Daniel says:

> "To meet the objection made to the sale in this case, founded on the inadequatcy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts; namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation, that if the inadequacy be of a nature so gross as to shock the conscience it will amount to proof of fraud."

And the appellee says here, as Justice Daniel said there, at page 312:

> "* * * When all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion that the gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. They betray that *malus dolus* in which the design of the appellant was conceived, which appears to have presided over and regulated the progress of the design from its birth to its consummation; to which design the appellant has tenaciously clung, in the seeming expectation that it was beyond the corrective powers of law or justice."

Justice Daniel says in the last quotation that the several acts complained of betray the design of the appellant, but in the case at bar no conjecture need be indulged as it is found by the court that Stephens & Schroeder *so acted* as to obtain an unconscionable sacrifice of the appellee's property, and that they *so bid* as to accomplish the result of which the appellee complains.

See also 117 U. S. 180, Graffam vs. Burgess.

In this case appellants contend that though appellee was made to believe by Mr. Stephens that the statutory period to redeem in would not be insisted upon, and though the consideration was unconscionable, yet that everything was done according to the forms of law, and therefore no relief can be granted.

To similar claims in the above case of 117 U. S. 186, Justice Bradley says:

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it are often to proceed according to the strictest forms of law."

In speaking of the design manifest in the case, Justice Bradley at page 190 says:

> "Looking at the whole case, the traces of design on the part of Graffam to mislead the complainant, to lull her into security, and thus prevent her from redeeming the property, are abundantly manifest, and such design must be assumed as an established fact in the case"

As to the general principle upon which courts act to set aside execution sales, Justice Bradley at page 192 says:

> "From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold.
>
> "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

A careful reading of the foregoing opinion and the cases there cited demonstrates the fact that the sales here complained of are saturated with actual and constructive fraud from their inception *until* and *after* their completion; and that such irregularities are not merely formal or slight, but serious and substantial and necessarily tended to the sacrifice of the property sold.

See also:

84 Am. Dec. 614, Chamblee vs. Tarbox.
4 Johns. Ch. 119, Howell vs. Baker.
18 Am. Dec. 219, Blight's Heirs vs. Tobin.
73 Ill. 462, Morris vs. Robey.
2 Free. on Ex., Sec. 322.

28 Am. Dec. 236, Nesbitt vs. Dallam.
29 N. E. Rep. 1038, Bullen et al. vs. Dawson.

POINT III.

REPLY TO APPELLANTS' BRIEF.

There is very much in appellants' brief, and heterogeneous citation of cases, sufficiently answered, but a few points will be noticed in detail:

In this connection it is pertinent to remark that all the cases cited by appellants that bear on the subject of redemptions after the time provided by law has expired, are where there was only an inadequate consideration and where the inadequate consideration was not coupled with unfair conduct, or if there were some trifling irregularities in a sale that the property was not sold for an unconscionable consideration. In some of the cases there were slight irregularities but there was always some element in the case where relief was refused upon which the court was justified in so doing, but in no case was there a conjunction of the elements entitling a party to relief such as are contained in the record in this case. It is an important element in the cases, as to the animus and intention of the party who obtains the property, and it is asserted that this record discloses the corrupt intention of the appellants to obtain all of appellee's property for an unconscionable consideration.

It will be seen by inspecting appellants' brief pages 10-16 that their whole contention on this appeal is, that this court shall disregard certain pertinent findings which entitle appellee to the relief granted.

Attention is invited to appellants' efforts all through their brief to belittle the value of appellee's property, also that he only owns an undivided one-sixth of the same, that

the title is clouded, and finally that "* * * so questionable a title surely can have no market value about which experts can testify or a court make a finding."

(See Appellants' brief, page 44 near bottom.)

Attention is thus invited to test appellants' good faith in this contention when they would not accept the full amount of the Clark, Eldredge & Co. judgment, with interest at one per cent. per month, and liberal compensation for all services and trouble, and all advances with interest, *and a bonus of one thousand dollars.*

(See 28th finding, Record pages 19-20.)

It is said the 9th and 23rd findings are contradictory. Not so, as the 9th finding is that the part of Lot 2 in question is one parcel, and the 23rd finding is only to the point of what part thereof is subject to life estates.

It is said the 31st, 17th and 15th findings are contradictory. No; because it is entirely consistent that Mr. Stephens was the only bidder according to the 15th and 17th findings, and yet that Mr. Stephens bid in Lot 12 for Mr. Schroeder as found in the 31st finding, and that Mr. Schroeder appeared as the purchaser in the marshal's deed.

It is said that the 28th and 30th findings are contradictory. The 30th finding relates only to Lot 12, and the 28th finding refers to full settlement of the judgment and a re-conveyance, and is entirely consistent with ignorance of the sale of Lot 12, as the word "properties" refers to the different sales of Lot 2; and neither of these findings in any sense contradicts the pleadings.

It is said the 15th and 10th findings are contradictory. The 15th finding is that it was the intention to obtain all the appellee's property, and the 10th is that at the time of the sale of the 15½ feet by 28 feet that Stephens &

Schroeder did not have actual knowledge of any other realty. It is entirely consistent that Mr. Stephens intended to get all of appellee's property, and yet not actually know of all of all of it at the time the first sale was made. In fact, as before said, it was well to be ignorant of property owned in conjunction with that first sold as the sacrifice could the easier be accomplished; but it will be observed that they promptly found the adjoining property when it came to a second sale.

The trial court as heretofore pointed out has found actual and constructive fraud on the part of Stephens & Schroeder.

In answer to considerable of appellants' brief, it is here stated, that the appellee had no knowledge of the irregularities complained of, and even if he did, his delay was excusable after Mr. Stephens assured him that the statutory time to redeem would not be insisted upon, and the appellee was relying on such assurance.

As to the alleged claims that the court did not find Stephens & Schroeder *designedly* did anything to wrong the appellee and that the *fraudulent intent* is wanting, it is again stated that the court found expressly by the 10th, 11th, 13th, 15th, 20th, 24th, 27th, 28th, 30th, 31st and especially the 32nd findings, that both of these ingredients existed in their full maturity in all the acts accomplishing the ruin of appellee.

The promise of Mr. Stephens not to insist on the statutory period to redeem is one of the frauds in this case, and one by which the appellee's property was obtained; it was proper to prove and find all the fraudulent contrivances.

The testimony of the appellee was also admissible to show that Mr. Stephens had given assurances that the

statutory time to redeem in would not be insisted upon.

2 Free. on Ex. Sec. 316.

The court also in the 24th finding, Record page 19, found that the appellee believed and relied on such assurances.

The acts of Mr. Stephens bound his partner Mr. Schroeder, especially when such acts benefited both.

18 Am. Dec. 219, Blight's Heirs vs. Tobin.

So as to the claim of error in admitting Mr. Van Cott's testimony in regard to the redemption of Lot 12—this testimony was a strong circumstance tending to prove the fraudulent design to obtain all the appellee's property together with accruing and accompanying benefits, such as the payment of taxes by appellee on property to which appellants held the marshal's deed. The rule is liberal in allowing evidence to show fraud.

It is claimed that the court erred in not allowing appellee's witnesses John H. Linck and S. B. Westerfield during cross-examination to answer certain questions.

It is alleged in the complaint and not denied that:

> "* * * That all of the several parts of said Lot 2 above described, and of said Lot 12, were owned by the said plaintiff and his sister Lydia Y. Merrill, in undivided equal parts, subject to a life estate in Sarah M. Young, the mother of said John M. Young and Lydia Y. Merrill, to the extent of an undivided one-fourth during her lifetime. * * *"

See Record page 3.

On page 41 of appellants' brief the above is admitted but it is said that such allegation is not sufficient as an averment of ownership.

This allegation is sufficient, and evidence tending to contradict the same was not competent.

In 38 Cal. 218, Garwood vs. Hastings, Chief Justice Sawyer said:

> "The complaint is sufficient. The allegation that the plaintiff 'is the owner' of the land, is, in substance, an allegation of seizin in fee, in 'ordinary' instead of technical language, as is permitted by Section 39 of the Practice Act. Payne vs. Treadwell (16 Cal. 242, 244), determines the point."

The opinion in the case of Payne vs. Treadwell was delivered by Chief Justice Field, and is recognized in all the Western States as a leading authority on the point to which it is cited.

The Practice Act of Utah is the same as the Practice Act of California on the point referred to.

2 Compiled Laws of Utah, 1888, page 243, sec. 3219, sub. 2.

An inspection of the questions asked also show them to be improper at that time—as not proper cross-examination.

See Record pages 26-7-8.

There is another answer also, and that is that the title was and is as alleged in the complaint:

John Young by his will devised this property to the appellee and his sister subject to certain life estates, as appears from the decree of distribution.

Record pages 35-6.

Probate courts are entitled in this Territory to the same presumptions as district courts which are of general jurisdiction.

2 Compiled Laws of Utah, page 193, section 3016 provides:

> "The probate proceedings, records, orders, judgments and decrees of this court are construed in the same manner, and with like intendments, as the proceedings in courts of general jurisdiction, and to them there is accorded like

force, effect and legal presumptions as to the records, orders, judgments and decrees of district courts."

The probate court has authority to distribute the decedent's estate, and to adjudicate the rights of heirs and devisees, and such adjudication was final and conclusive unless set aside.

Sec. 4262, page 529, of 2 Compiled Laws of Utah, 1888, reads:

"In the order of decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, and sue for in any court of competent jurisdiction and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal."

See also 36 Cal. 277, estate of Garrand, to the same effect.

The time in which to appeal is limited to one year, and as the decree of distribution was entered February 21st, 1890, the time in which to appeal expired before any of the levies or sales in question were made.

The record shows at page 58, testimony of Sarah M. Young, that the youngest child of John Young, deceased, aside from appellee and his sister Lydia Y. Merrill, was very old at the time of the trial of this action, and in Utah Territory an action for realty is barred in seven years.

2 Compiled Laws of Utah, 1888, page 221, Sec. 3132.

The decree of the probate court herein destributes the property in question and vests the title as alleged in the complaint.

On Rec. page 35-6 the decree reads:

"And the court further finds that the realty devised by the will of said deceased passed to Sarah Milton Young and Ann Oliver Young, Lydia Ann Young and John Young as follows, to-wit: To Sarah Milton Young, and Ann Oliver Young an undivided one-fourth interest each, as long as they lived and did not re-marry, and on the death or remarriage of either or both of them, the remainder thereof passed in fee in equal undivided shares to said Lydia Ann Young and John Young, and the other undivided half in said realty passed to Lydia Ann Young and John Young in fee in equal, undivided shares."

And on Rec. page 37, the decree further reads:

"That Sarah Milton Young Ann Oliver Young, John M. Young, and Lydia Y. Merrill, as heirs and devisees under said will, are entitled, as hereinbefore stated, to the remains of said estate, which is described as follows, to-wit:

"Commencing 64½ feet west from the northeast corner of said Lot 2, thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning. Also Lot 12, Block 8, Five-Acre Plat "A," Big Field Survey, situated in Salt Lake County, Utah Territory."

Hence title is in appellee as alleged in the complaint beyond intelligent controversy.

The above also shows that the part of Lot 2 in question constituted but one tract; a careful reading of the decree of distribution shows that the 16 feet by 20 rods was always equitably owned as the other part and when the error was discovered and rectified, it was then owned equitably and legally.

It is claimed that in one action appellee could not redeem from the several execution sales.

The property obtained was by a series of fraudulent

acts brought about by the joint action of Stephens & Schroeder according to an antecedent determination, and the cause of action was based on these actions as a whole, hence the action was properly brought.

Pomeroy on Rem. & Rem. Rights, Sec. 455.

Complaint is also made because appellants were taxed with costs.

2 Compiled Laws of Utah, 1888, page 379, Sec. 3684 to 3687, both inclusive, leave the matter of costs in such cases as this to the discretion of the trial court, and that discretion was exercised by taxing appellants with costs.

Again, 2 Compiled Laws of Utah, 1888, page 449, Sec. 3964, provides:

> "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property."

Finding 28, Rec. pages 19, 20 and the complaint at Rec. pages 4, 5 show that appellee made a legal tender and did all he could to induce appellants to take the money they had advanced or in any way paid out, but without success.

Clark, Eldredge & Co. took judgment against appellee and two others for about $1700.00 (see Rec. page 15, 3d finding); as between appellee and the other two judgment debtors, only one-third of that amount was owing by appellee and he paid before that suit was commenced $800.00, and the other two-thirds was owing by the others, and they were promising from time to time to raise the money and relieve the appellee from any further responsibility.

See Rec. pages 58-9.

To avoid this court being misled, we invite attention to the tesimony of Frank B. Stephens on Rec. page 31 to

show that such partial testimony is only *part of an answer* in a series of questions and answers. (See Record page 56, first answer above 102 on the margin, after the words "Why, for the simple reason.")

At the end of page 59 of appellants' brief, an alleged review of the opinion of the Supreme Court of Utah is undertaken, and a scurrilous and unjustifiable attack is made on Chief Justice Samuel A Merritt who delivered the opinion, as well as upon the court. A reading of that opinion will show that the court considered the case carefully and fully, and the animus manifested by appellant is due to the fact that while this portion of his brief was in preparation he was smarting under the very just reflection which the court had made upon his conduct.

It is said that the appellee elected not to rely on the fraud and therefore cannot now complain of such matters.

The appellee had a right to buy his peace and offered to do so, but appellants would not permit this but preferred that the appellee should either lose his all, or endeavor unsuccessfully as was doubtless supposed, to compel appellants to disgorge and do equity. But the irregularities, aside from the fraudlent practices, entitle appellee to the relief given.

117 U. S. 195, Graffam vs. Burgess.

Appellants complain that appellee should have appeared by motion in the Clark, Eldredge & Co. suit to set aside these deeds and that it should not have been by complaint in equity.

It is difficult to see any reason for such a contention; for how can the appellants be damaged, whether appellee seeks his remedy by motion in the Clark, Eldredge & Co. suit or by complaint in equity. If he is entitled to relief it must be immaterial to appellants whether it is obtained

in one way or the other. But under the authorities it is very clear that where the time for redemption has expired, if a party desires to complain of the sale of his property he must then do so by a complaint in equity and not by motion in the original suit.

2 Freeman on Ex., Sec. 310.
117 U. S. 181, 186, Graham vs. Burgess.
109 Ill., 647, Jenkins vs Merriweather.

In this case it is beyond controversy that the appellee should seek relief by complaint in equity and not by motion in the original suit, for the following reasons:

After Stephens & Schroeder obtained the marshal's deeds they mortgaged this property to Theo. Schroeder for a thousand dollars. (See 34th Finding, Rec. p. 21.) Theo. Schroeder was an innocent party in the transaction and his mortgage was not due and was unpaid at the time of the institution of the suit; consequently it was necessary for a court of equity to adjust this matter; also it appears from the complaint that appellants had received rents from the property, and that various sums of money had been expended for taxes and other purposes, and it was necessary in adjusting the rights of the parties to go into an accounting and this could not be done by a court of law; and also in order for the appellee to obtain adequate relief it was necessary that the deeds should be canceled and this could not be done by a court of law.

The appellants complain because the six per cent. penalty was not charged against the appellee on being allowed to redeem.

THE FACTS ARE THESE:

Sometime prior to April 30, 1892, Stephens & Schroeder had obtained marshal's deeds for all of the appellee's prop-

erty, and appellee began this action April 30, 1892. In the accounting Stephens & Schroeder were allowed interest on the Clark, Eldredge judgment fron the time of its rendition until the filing of this suit, to-wit: April 30, 1892, at one per cent, per month. When this suit was filed, the plaintiff in his complaint offered to pay Stephens & Schroeder the full amount of the Clark, Eldredge judgment together with interest thereon at one per cent. per month, and also to liberally compensate Stephens & Schroeder for all their services and trouble in the premises, give them $1,000 as a bonus and repay all their advancements with interest, if they would re-convey the properties in litigation to appellee. This offer Stephens & Schroeder refused.

Under our statute this tender being in writing, was sufficient without an actual production of the money.

2 C. L. Utah, 449, sec 3964, quoted heretofore.

It is thus apparent that on April 30, 1892, the appellee made a legal tender to Stephens & Schroeder of an amount largely in excess of what was due them and they refused it, and it is very difficult to see on what theory the appellee should be compelled to pay interest to Mr. Schroeder at one per cent. per month from the time of the legal tender until this judgment shall be finally affirmed.

Such contention is very clearly opposed to what is justice in the premises.

Appellants also complain because the lower court provided that the amount due Mr. Schroeder should not bear interest after the same was legally tendered to him. It is also difficult to see why appellants complain of this. They had the right to take the money.

It was and is necessary that appellee should be able to give Mr. Schroeder this money at any moment he de-

mands it and therefore that it should always be on hand for that purpose. Mr. Schroeder might now demand the payment of that money, and if he did appellee would be compelled to pay it immediately under the decree. Consequently it ought not to bear interest.

Appellants are inconsistent in claiming in one breath that the deeds should not have been canceled and the sales set aside or the appellee permitted to redeem, and then in the next breath arguing that the appellants ought to have the 6 per cent. penalty.

Appellants do not contend or claim in their brief that the apparent deed from defendant in error to W. H. Dickson and others is not a mortgage, so the matter is not discussed, and reference is briefly made to the record to show the instrument is a mortgage.

See Record pages, 38, 39, 40 and 61.

Appellants have assigned other alleged errors which they have not discussed and therefore we do not discuss them; appellants also state many things as facts which are not, and which do not appear in the record; we speak of this to show that we do not acquiesce in such statements. We do not undertake a review of appellants' cases as they are not in point under the circumstances in this case.

In conclusion we submit that it would be an offense against justice and a disgrace to its administration to permit the appellant Schroeder to retain this property. He and his partner Stephens, were, as we have seen, the attorneys of the judgment creditor. As such they directed the marshal from time to time upon what property to levy execution to satisfy this judgment, furnishing him the descriptions of the several pieces of property to be so levied upon. Their directions in this respect were such that if they were complied with, the property must necessarily be sacrificed, and the marshal did comply with their direc-

tions, and property worth at the very least twenty-six thousand dollars, was acquired for about two thousand or one-thirteenth of its value.

Public policy, we submit, will not tolerate such a transaction as this. It will not suffer attorneys in a case pending in the courts to so manipulate the processes of the court as to enrich themselves at the expense of a suitor before the court. It must be conceded from the record that there was a gross sacrifice of the appellee's property; it must be conceded that the execution sales resulting in this sacrifice were attended with many and serious irregularities. Such being the case, a decree permitting the appellee to redeem upon terms that will protect the purchaser from all loss, is a matter of course. Where such facts are clearly established by the evidence, and a decree is pronounced permitting the redemption on equitable terms, it will not be disturbed because of any alleged technical errors committed in the trial of the case, because all such alleged errors are seen to be unprejudicial.

Respectfully submitted,

PARLEY L. WILLIAMS,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1894, No. 808.

A. T. SCHROEDER & WIFE,
Appellants,

vs.

JOHN M. YOUNG,
Appellee.

Appeal from the Supreme Court of Utah Territory.

Reply to Appellee's Brief.

A. T. SCHROEDER,
Attorney for Appellant.

JAS. B. EDMONDS,
Counsel.

PARLEY L. WILLIAMS,
Attorney for Appellee.

15,692.

REPLY TO APPELLEE'S BRIEF.

In the outset of their argument (p. 8), appellees state it to be the general rule that gross inadequacy of consideration, coupled with slight irregularity, will justify the setting aside of the sale, and upon this they apparently rest their case. We may admit this to be the rule with two limitations. FIRST: That the statute provides no period of redemption; and SECOND: That the purchaser is responsible for the irregularity and through it or otherwise was the cause of the inadequacy.

When there is a redemption period provided by statute, and the debtor has knowledge of the levy and sale, the inadequacy is indeed to his advantage, because he has that much less money to raise on redemption day.

We contend that in an action to set aside sales as "fraudulent and void" the court cannot deny fraud and grant relief on any other ground. But even if we are wrong in this, the controversy must still turn upon the sufficiency of the excuse offered for not redeeming within the statutory period.

Relief being granted after the redemption period and not for fraud, irregularities become immaterial.

If there has been a valid extension of the redemption period by contract, or an estoppel against taking the Marshal's deed at the end thereof, the appellee should be permitted to redeem in a proper action without showing irregularity.

Without such extension or estoppel his right to question the sales for irregularity is barred with the expiration of his right of redemption. Upon this question see argument and authorities on

p. 20 to 25 of appellant's brief. Upon the question as to whether there is an agreement or estoppel see pp. 25 to 40 of appellant's brief.

These arguments appellee prefers not to emphasize by attempting a reply, and apparently hopes to have made sufficient bluster to prevent the court from discovering that this is one of the principal issues of law in the case.

Again we remind this court that the trial court has not found one single act to have been done by this appellant which the law will declare fraudulent, nor has it found one single act as having been done with a fraudulent intention. The trial court therefore neither found actual nor constructive fraud, and therefore refused to decree that the sales be declared fraudulent and void as prayed for in plaintiff's complaint, but decreed that the plaintiff be permitted to redeem, thus affirming the sales.

We have argued in our brief that in an action to set aside sales as fraudulent and void, the court cannot grant relief based upon the inconsistent theory that the sales are good. To this appellees have attempted no reply.

We now proceed to discuss the appellee's argument in detail.

POINT 1.—INADEQUACY OF PRICE, (p. 8 Appellee's Brief.)

INADEQUACY OF PRICE IS ONLY A CIRCUMSTANCE TENDING TO PROVE FRAUD, AND NOTHING MORE. In the absence of fraud the inadequacy becomes immaterial for the same reasons that are already given to show the immateriality of irregularities.

"The modern rule is: Fraud is inferred like other facts from evidence. No rule of law has been laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud."

2 Pomeroy Eq. Jurisp., Sec. 928. note. Harris vs. Tysom, 24 Pa. St. 347; 64 Am. Dec. 661. Davidson vs. Little, 22 Pa. St. 245; 60 Am Dec. 81.

"Inadequacy of price is a fact which is admitted to be given in evidence in proceedings of this nature to establish with other circumstances, fraud in the officer making the sale, but is never itself sufficient to annul such sale, and certainly it would not be sufficient under our law, which provides for the redemption of property sold."

Smith vs. Randall, 6 Cal. 47; 65 Am. Dec. 480.

The fact of a purchase by a judgment creditor, at an inadequate price, at a public judicial sale, when the purchaser did not interfere with the sheriff, and did nothing to deter bidders, is not ground for the slightest inference of fraudulent purpose.

Mead vs. Conroe, 8 Atl. 347; 113 Pa. St. 220.

This should be especially true where a period of redemption is provided after the sale.

Appellee does not controvert our proposition that the allegation as to the extent of plaintiff's ownership was immaterial to the cause of action, and therefore, not admitted by a failure to deny. The extent of plaintiff's ownership is a mere incident to be taken into account in determining value. It is therefore error not to require witnesses to take into account all clouds upon the title affecting market value, before permitting them to testify concerning it. (See pp. 41-43 of our brief.)

We repeat that if only proper evidence of value had been admitted the inadequacy would at least have ceased to be gross.

POINT 2. IRREGULARITIES, (p. 9 Appelllee's Brief.)

The first irregularity complained of is that the attorneys of the judgment creditor, with the latter's consent, became purchasers at some of the execution sales.

Appellee relies upon the case of Howell vs. Baker, 4 Johnson's Ch. 118, 1 Law Co-op. Ed. 785, and here (as in the Supreme Court of Utah) misquotes that opinion so as to entirely change the sense. The Court is speaking of a trustee's inability to purchase trust property, and says that a purchase "by the solicitor of the assignee" is within the rule.

On page 786, Vol. I., Co-op. Ed., the Court speaks of "the rule disqualifying trusteess and PARTICULAR SOLICITORS AND ATTORNEYS from purchasing," etc.

The Court evidently meant by that language to indicate "particular" classes of solicitors, to-wit: solicitors of trustees.

Appellee has made the sentence read "the rule disqualifying trustees and PARTICULARLY SOLICITORS and attorneys from purchasing," thus entirely changing the sense of what the Court said.

All the cases cited in Howell vs. Baker, to-wit: Hall vs. Hallet, 1. Cox. 134-s.c.; 1. Rev. Rep., 3: Ex parte Hugues 6 Ves. 617-s.c.; 6 Rev. Rep. 1: and Ex parte James 8 Ves. 337-s.c.; 7 Rev. Rep. 57; are cases holding that a trustee cannot purchase trust property, and that the solicitor of the trustee is also barred.

Not one of these cases, nor the case of Howell vs. Baker hold that an attorney cannot purchase in a case where his client could do so, provided no injury is done the client.

If Howell vs. Baker could possibly be construed to hold any different rule it must be considered overruled by the later New York decision of Hawley vs. Cramer, 4 Cow. 718; 8 Law Co-op. Ed. 542, where it is held that "where the client is not prohibited from purchasing, the attorney may purchase with his consent; and neither the defendant in the execution or a third person can object to the validity of such a purchase."

In Jones vs. Martin, 80 Am. Dec. 643, cited by appellee, the

Court EXPRESSLY WAIVES A DECISION UPON THE QUESTION, but discusses somewhat Howell vs. Baker and upon its authority, and the cases cited therein, says: "It is questionable whether a purchase by an attorney under his client's execution, over which he had control, would not be deemed in itself invalid in England." This is clearly a misconstruction of Howell vs. Baker, and is not warranted by the cases therein cited. In so far as the court speaks of this quetion without deciding it, the opinion only elaborates on this misconstruction of Howell vs. Baker. Neither of the cases cited by the appellee sustain his position, and neither conflict with the case cited by appellant on pages 50 and 51 of our brief.

SECOND IRREGULARITY, (p. 11. Appellee's Brief.)

An execution was issued on the judgment and some property sold thereunder. Thereafter (whether after or before the return of the first execution does not appear) a second execution was issued for the full amount of the original judgment. The clerk had the right to issue two or more executions.

2 Comp. Laws of Utah, Sec. 3425, p. 305.

In Glidden vs. Chase, 35 Me., 90-s.c.; 56 Am. Dec. 690, the officer exceeded his authority as conferred by the execution and the Court held his act a nullity. That case will be readily distinguished from the one at bar by attending to the difference between an act unwarranted by the judgment or execution, and one done by an exercise of authority properly conferred, though by an erroneous judgment. It does not appear that any part of the judgment had actually been satisfied at the issuance of the second execution, though the Marshal may have had the money. One is bound to know whether the sale is warranted by the judgment, but is not bound to know whether the judgment is excessive.

THIRD IRREGULARITY, (p. 12 Appellee's brief).

This is in principle the same objection as the last, and this discussion may be considered for both.

At the last of the three sales which were had, property was sold in excess of the amount actually left unpaid on the judgment. It is shown by finding No. 4 that the U. S. Marshal at the time of making his return after the first sale erred in calculating the amount left unpaid on the judgment, and by reason thereof, there was a larger unsatisfied judgment than should have been. This error was carried through into the return after the second sale. The officer returned $100 unpaid (finding 6, p. 16), when in fact there was unpaid only $25.50 (finding 11, p. 17.) It is not claimed that the appellant had any knowledge of, or connection with this error.

The appellee cites three cases which it is claimed justified their position, that the facts above stated avoid the sales. It must be remembered that in the case at bar there were three separate sales, and that the law as laid down by appellee's cases is that "where several levies and sales were made for separate sums, only such sales and levies would be considered void as are made to satisfy an amount in excess of the judgment."

Hastings vs. Johnson, 1 Nev. 614, cited by appellee.

All of the cases cited by the appellee are without application here because they are all decided under statute denying the right under any circumstances to sell property in excess of the amount of the execution.

Section 3430, Vol. 2, of the Comp. Laws of Utah, p. 309, reads as follows: "The officer must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the

things in action, and selling the other property, and paying to the plaintiff or his attorney, so much of the proceeds as will satisfy the judgment; ANY EXCESS IN THE PROCEEDS OVER THE JUDGMENT AND ACCRUING COSTS, MUST BE RETURNED TO THE JUDGMENT DEBTOR, unless otherwise directed by the judgment or order of the Court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs." The statute clearly contemplates that the officer may sell more property than enough to satisfy the judgment if the property is not of a character to be readily devisable. None of the three cases cited by the appellee were made with reference to such a statute.

In Patterson vs. Carnell, 13 Am. Dec. 209, the Court expressly says that "a sale of more property than enough to satisfy the judgment is neither authorized by the statute nor the execution," and because unauthorized it was held void.

Glidden vs. Chase, 35 Me. 90-s.c.; 56 Amer. Dec. 690, has no application to the case at bar. In Maine the statute provides that appraisers are to be appointed, who set off to the judgment creditor an amount of land just sufficient to satisfy the judgment and costs. If they set off more they clearly act without authority and the act is a nullity. It seems to us very clear, that a decision made under such a statute can furnish no precedent in this case, where property is sold as authorized by statute, and when the only irregularity is that the judgment is excessive, but all proceedings are warranted by it.

In Hastings vs. Johnson, 1st Nev. cited by the appellee, the Court holds that the execution must be authorized by the judg-

ment as to the amount; if it exceeds the amount of the judgment the levy and sale made to satisfy the excess is nugatory. That decision has no application here, because in the case at bar, the execution was authorized by the judgment, though the judgment was excessive owing to the error of the officer in not making proper credits.

None of the three cases cited by the appellee are in conflict with Milner vs. Bass, 29 Fed. 635, where it is said:

"The sale was not invalid because the proper credits for payments were not noted on the execution. Bass, the purchaser, having no knowledge of the facts. The purchaser at the execution sale is not bound to have examined the docket to see if the clerk has done his duty in this respect, Fowler vs. Griffen, 83 Ind. 297."

This case, it appears to us, is exactly in point and none of the cases cited by the appellee are.

We again call attention to our argument anticipating this question as found on page 54 of appellant's brief.

FOURTH IRREGULARITY, (p. 12 Appellee's Brief.)

"In the sale made under the several writs of execution, of portions of lot two, it appears that in each instance, the levy and sale were upon a specified portion of plaintiffs interest." This is the statement contained in appellee's brief.

We call attention to finding No. 7, p. 16 of the record, where it is found that on one execution sale the following part of lot two was sold, beginning 64½ feet west of the northwest corner of said lot two, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90⅜ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning.

This is the identical tract, and all of it, described in finding 23, p. 18 of the record as being held by the plaintiff and his sister in equal parts by virtue of the same instrument and source of title, to-wit: "All of the several parts of lot two (2) with the exception of said twenty (20) rods north and south, by sixteen (16) feet east and west," being all but one rod off the west side of the tract described in the map.

By reference to the map it will be seen that these two descriptions cover the same identical tract.

Thus far then it appears the officer did exactly what appellee claims he should have done.

The one rod by twenty which in finding No. 23, p. 18 of the Record, is excepted as not coming from the the same source of title as the rest, and as not being subject to the life estates, were sold in two parts by the identical descriptions by which they were conveyed to appellee.

See descriptions in findings No. 7 and 8, p. 16 of the Record, and those in stipulated evidence on p. 37 and 38.

These are all of the parts of lot two in controversy and it would seem, therefore, that the officer did all the appellee claims he should have done.

Even if the officer had sold debtor's interest in part of an entire tract held as tenant in common, this would not affect the validity of the sales for two reasons.

I.—Appellee argues that this would result in sacrifice, because appellee's co-tenants could ignore the sale in a partition suit.

It is not the law in Utah that a co-tenant cannot convey his entire interest in a part of the co-tenancy. Such a conveyance is good even as against the co-tenant. The Utah statutes have the following provisions:

"Whenever from any cause it is in the opinion of the Court,

impracticable, or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the Court may first ascertain and determine the shares or interests respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition, separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been set apart, or may allow them to remain tenants in common thereof as they may desire."

2 Comp. Laws 1888, Sec. 3487, p. 327.

Also, "If it be alleged in the complaint, and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, OR ANY PART OF IT, is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof."

2 Comp. Laws 1888, Sec. 3490, p. 328.

Under these statutes the rule invoked has no application.

The Supreme Court of Missouri in discussing the question said: "The only reason given for the rule is that it would render a partition of the land more difficult, and compel the co-tenant to take smaller pieces and more of them to make up his share. But this reason is not applicable to our laws concerning partitions. Here the partition is not necessarily made in kind, as it is in other states and in England; but if partition in kind would prejudice the rights of the parties, the land is required to be sold, and proceeds divided among the parties according to their respective rights. Each party has the chance to purchase such quantities as

he may think proper. The reason upon which the old technical rules were founded has long since ceased to exist in this State, and in fact it never did exist here, as the main features of our partition law were in force in the Territory of Missouri before it was formed into a state, and have ever since remained in force. When the reason for the rule ceased, the rule itself also ceased, and accordingly such conveyances have been made and acquiesced in by the community and the legal profession as valid."

Barnhart vs. Campbell, 50 Mo. 599. See also Cox vs. McMullan, 14 Grat. 82-93.

It is not the well settled rule as appellees assert, that a co-tenant's conveyance, either voluntary or involuntary, of all his interest in part of the subject of co-tenancy is void.

Even in those states where they have not the statutes such as we have in Utah and Missouri the sale is only voidable at the election of the co- tenant and good as against the grantor. This is shown by appellee's own authorities.

Freeman on co-tenancy, Sec. 204, says: "We are not sure that the difference in the decisions of many of the courts upon this subject has not been more in form of expression than in matters of substance. If however, there remain any States wherein the courts really intend to assert that a conveyance by one co-tenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the non-assenting co-tenants, such Courts are falling into the minority, as the more recent decisions tend strongly and surely toward the recognition of such conveyance as a valid transfer of all of the grantor's interest in the property therein described; entitling the grantor to certain rights that the co-tenants of the grantor cannot wantonly disregard."

In Smith vs. Benson, 9 Vt. 216, cited by appellant, the ques-

tion arose between the co-tenant and the purchaser, the Court said: "It may be true that this levy will operate as an estoppel against the debtor, Abijah Benson, and, had partition been made, it might enable the plaintiff to hold so much of the land as fell to the share of the debtor. But that case is not now before us." When in a later case Howe vs. Blanden, 21 Vt. 322, the question did arise; it was squarely held that as against the judgment debtor the levy was good, and neither he nor any one holding under him could object.

The note to Smith vs. Huntoon, 23 Am. St. Rep. 651, contains nothing conflicting with the conclusion reached by [illegible]man as quoted above, nor with Barnhart vs. Campbell, 50 Mo. 599.

We disagree with appellee as to the effect of the decisions and assert that in all cases which we have been able to find (including those cited by appellee) it is held that such sales are not void and that as against the judgment debtor a sale under execution of all his interests in part of a tract held by him as tenant in common with others is good.

> See Howe vs. Blandin, 21 Vt. 322; Treon vs. Emerick, 6 Ohio 399; Gregory vs. Tozier, 24 Me. 308; Goodwin vs. Gregg, 28 Me. 188—48 Am. Dec. 490; Varnum vs. Abbot, 12 Mass. 474; 7 Am. Dec. 87.

And under our statutes such a sale is not even voidable at the option of the co-tenant.

> Barnhart vs. Campbell, 50 Mo. 599, quoted from above.

Let us assume that the sheriff in the honest exercise of his judgment believed Young's interest in the parts of lot 2 worth, as the court found $25,000.00 and that he had, as appellee says was his duty to do, levied upon all of Young's interest in the entire

tract, and then sold if possible a fractional part of his interest in the whole.

It is to be remembered that the land is so situated, and used, as is apparent from the plat in the record, and the different estates in which it is held by different sources of title, that it was plainly divisable.

The officer would in that case have clearly exceeded his authority, which is to levy "on a sufficient amount of property" to satisfy the debt, and appellee would have reasoned as did this Court in Byers vs. Surget and said "the wanton excessiveness of the levy is an abuse of the process of the Court, and evidence of a fraudulent design with a view to incite suspicion, and to deter purchasers by reason of that suspicion, and by offering larger portions of property than many persons would be willing or able to buy." It seems then that the officer would be violating his duty if he did levy on all, and also according to appellee if he only levied on a part. And if we take appellee and this court as both being correct the officer is placed between Scylla and Charybdis.

The Utah statutes say that: "Upon a sale of real property, the purchaser is substituted to and acquires ALL the right, title, interest and claim of the judgment debtor thereto."

2 Comp. Laws, Sec. 3442, p. 312.

How then can an officer by any possibility sell a fractional part of the debtor's interest as it is claimed he should do?

The several statutes quoted we think make very plain the duty of the officer.

He must levy upon a "sufficient amount of property" to satisfy the debt and sell "all the right, title, interest and claim of the judgment debtor thereto."

When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs, within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs." If the debtor does not avail himself of this right, he cannot complain if the officer exercise his discretion without fraudulent intent as to the portion selected. If he sell more than is necessary to satisfy the judgment, "Any excess in the proceeds over the judgment and costs must be returned to the judgment debtor." "The purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto," whatever that may be, and the officer has no right to sell a fractional part of debtor's interest. If the property be a co-tenancy and all the debtor's interest in the whole is more than is necessary to satisfy the judgment, and the debtor fails to designate in what part the officer shall make his levy, the officer has a plain discretion to sell all the debtor's interest in a part of the tract, if the tract be conveniently divisible, and if not to sell all of his interest in all the tract, yielding the surplus money to the judgment debtor. He cannot sell a fractional part of debtor's interest under any circumstances.

Our statutes providing for a partial partition, or for a sale of the property in case "the property or any part of it is so situated that the partition cannot be made without great prejudice to the owners," removes every possibility of hardship or injustice which might result from a sale of part of an entire tract held as tenant in common.

The statutes concerning partition, and the one giving the purchaser all the debtor's title when taken together preclude the inference of any other intention on the part of the legislature, than

that they meant to prohibit the sale of a fractional part of the debtor's interest in real estate under any circumstances.

II.—Another reason why appellee cannot complain of this as an irregularity is that he is estopped by his own conduct from doing so. The appellee knew his property was being advertised for sale. He must, therefore, have known from the descriptions in the notice, that property which he now claims to be a part of one single tract was being advertised for sale. If he considered this an injury or illegal it was his duty to attend the sale, and make known the fact from which the illegality arose. It is found that Stephens and Schroeder were ignorant of the existence of the other property, which with the pieces sold constituted one tract. The appellee thus had it easily within his own power to prevent a sacrifice of his property, if in his opinion the manner of sale was calculated to produce that effect. By his silence he induced the purchaser to pay out a large sum of money, and sat quietly by, permitting the officer to credit these amounts on the judgment against him. Appellee must, therefore, be deemed to have acquiesced in the manner of sale, and placed his reliance for protection upon the law, which says that "the debtor's security against sacrifice depends upon his vigilance in availing himself of the right of redemption."

FIFTH IRREGULARITY, (p. 13 Appellee's Brief.)

The fifth irregularity is substantially the same as the fourth only it is particularized instead of being in general terms. It is that at the first sale a part of lot 2 was sold, beginning 101 feet north and 39½ feet east of the S. W. corner of said lot; thence east 15½ feet; north 28 feet; west 15½ feet; south 28 feet to place of beginning, and that this piece had no means of access to it, except over the lands of other parties. This piece is a part of the tract

which by finding 23 is especially excepted from the other portions of lot 2, owned by appellee, as not being subject to life estates, nor derived from the same source of title. It will be seen by the stipulated evidence p. 38 record, that this is by meets and bounds the identical and exact description by which Eliza Ann Rossiter conveyed this particular tract to John M. Young and Lydia Y. Merrill. The property east of this tract was held according to finding 23 by a different instrument, to-wit: The will of John Young, deceased, and in different estates, to-wit: Subject to life estate in Ann O. Young and Sarah M. Young. Under this state of facts it seems to us an unavoidable conclusion that it would have been error for the officer to have sold this tract with the other property as one parcel.

See Jackson vs. Newton, 18 John 355; 6 Co-op. Ed. 616 8.

We are to remember also that the trial court found that at the time of this sale neither Stephens nor Schroeder had any actual knowledge of appellee's interest in the adjoining property. Also remember that at this sale John Clark was the purchaser, and appellant did not purchase from him until after the expiration of the redemption period.

It cannot be claimed that Clark is not a purchaser in utmost good faith and without notice of any irregularity. Those taking under him, though with notice, succeed to all his rights as innocent purchasers.

Lacy vs. Wilson, 4 Munford (Va.) 313.

But appellant need not rely on this. The findings do not disclose notice in the appellant of even the alleged irregularities, prior to the purchase from Clark.

In their discussion of this finding appellee speaks of "assumed ignorance," etc., as though he did not consider the findings upon that subject binding, and also misconstrue finding No.

15 by mixing with the facts, found their mistaken notion of the law that one partner is chargeable with the secret intentions of the other. They charge Stephens and Schroeder with that which is found only to exist in Stephens, and with reference to a matter not within the purpose of the partnership. They charge also "a determination to obtain all of appellee's property," when no such determination is found even in Stephens.

The court found in Stephens alone an intention to bid in a particular manner on property which by finding 10 he did not know to exist. It will also be noticed that this is the only sale in which the court finds that the relation of cause and effect exists between the alleged irregularity and the inadequacy, and as to this part of the finding it is outside of the issues, and should be disregarded for that reason.

SIXTH IRREGULARITY, (p. 14 Appellee's Brief.)

It is claimed that the notice of sale should have set out, what the interest of the judgment debtor in the property sold was.

In our brief on page 52 we copy the statute and cite authorities which define the duty of an officer in this respect. No such duty is there created as appellee seeks to impose, and no reason can be given for any such rule as he contends for. The statute, by directing what the notice shall contain, thereby negatives every requirement except those specified.

Appellees cite only two Vermont cases. In Vermont the Sheriff levies, and appraisers are appointed, who set off to the creditor an amount of land just sufficient to satisfy the judgment.

The reason for the rule laid down in that State is, that the appraisers cannot appraise the value of the debtor's interest in the land as the statute contemplates, unless they know what that interest is. The levy and appraisement must therefore define that interest.

No such reason for the rule exists under the laws of Utah, and if it was now established would seriously affect every title derived from forced sale.

SEVENTH IRREGULARITY, (p. 15 Appellee's Brief.)

"The sale en masse of several distinct parcel or lots of land, without first endeavoring to effect a sale of the same separately, is voidable."

We admit that to be the law. The reverse of the proposition is also correct.

"Where a sheriff has offered for sale separately each of several tracts, lots or parcels of land levied upon, and has received no bid therefor, he may offer and sell some or all of the tracts, lots or parcels together."

Weaver vs. Guyer, 59 Ind. 195; Van Valkenburg vs. Trustees, 66 Ill. 103.

The issue of fact as to whether the officer had offered separate parcels separately before selling en masse was squarely raised by the pleadings, and the Court refused to find that the officer had not first offered the several tracts separately.

Appellant apparently is asking this court to overrule the presumption that the officer did his duty in this regard, and find that he violated the law notwithstanding the trial court with all the evidence before it refused to make such a finding. Will this Court create irregularities in order to set aside any of these sales?

It seems to us that a discussion of finding 15 sheds no light on this fancied irregularity. Unless Stephens possessed the infinite widom attributed to Deity he could not know in advance that he would be the only bidder. Under these circumstances a reasonable construction of this finding only means that he had decided at each sale to bid the least amount for which he could get the property consistent with his duty toward the judgment

creditor to collect the entire judgment. He did nothing to deter competition, and had a right to attempt to bid in the property for as little as he could get it for. Stephen's intention is wholly consistent with the duty he owed his client to see that the entire judgment was collected, and with the only duty he owed the judgment debtor, viz: To do nothing which would prevent a fair competition. Stephens did nothing to prevent competition, and was under no obligation either legal or moral to bid either the full market value of the property or any fixed percentage thereof.

EIGHTH IRREGULARITY (p. 16 Appellee's brief.)

It was an irregularity, as he claims, to make three sales instead of one, because it would increase costs. We have already quoted the statute making it the duty of the officer to levy upon only sufficient to satisfy the judgment. The findings as to value, we suppose to be binding, and if it is, it would clearly have been error to make so excessive a levy as would be made to sell all this property. It was sufficient if enough was levied upon to probably satisfy the judgment. When the officer by an actual sale finds that the part levied upon is insufficient it is then time enough to levy upon more property to satisfy the balance.

If the finding on value is to be relied upon any one sale might have brought sufficient to satisfy the entire judgment. It was therefore the officer's duty to levy on a part first.

Appellee in discussing this matter speaks of the sales resulting "from an agreement to sacrifice all the appellee's property regardless of its value." Of course the Court will observe that the trial Court did not find such an agreement, and this is only the finding of appellee's counsel.

Neither is there any finding that anybody so acted as to sacrifice appellee's property regardless of value. The findings

reasonably construed simply means that Stephens so bid as to get the property sold at the least sum consistent with his duty to the judgment creditor to try and collect the full amount of the judgment.

No act was done by any one calculated to result in a sacrifice of appellee's property, except an omission or refusal to bid its full value. Such an act of omission affords no grounds for the inference of any wrong nor of any intention to sacrifice the debtor's property in any other sense than the one implied in every desire by honest methods to secure a bargain in ordinary business transactions.

NINTH IRREGULARITY, (p. 16 Appellee's Brief.)

We have argued on page 15 of our brief that the finding that Stephens and Schroeder "so acted" is not a finding of any ultimate fact at all. We call attention again to the fact that no act (except the refusal to bid the full market value of the property) is set forth anywhere in the findings which is calculated or intended, or by any stretch of the imagination could have been intended as an attempt, to obtain this property for the least possible sum, as set forth in the findings. We have already discussed with plaintiff calls some of the evidentiary circumstances and have shown that all of the things complained of are regular and that even if there are irregularities, that Schroeder is in no way connected with them.

The matter discussed under the head of 9th irregularities in appellee's brief is not an irregularity attending the sale at all. If we admit all that is claimed for this finding without reference to its being contradicted by other findings, it would simply be circumstantial evidence of fraudulent intent, and must have been insufficient or rebutted by other testimony as to intent, because

the trial court refused to find fraud. There are then no irregularities and the officer did "pursue the hair line of legal and formal strictness."

"MATTERS EMPHASIZING THE IRREGULARITIES,"

(p. 18 Appellee's Brief.)

Just what is meant by emphasizing irregularities we do not know. If any of the matters complained of in appellee's brief are irregularities, in the manner of conducting the sale, they could not be made either more irregular or less irregular by any of the matters discussed in appellee's brief under this heading. In the opening statement of this part of appellee's brief he says, that the matters about to be discussed "demonstrated the intention of Stephens and Schroeder" and at the conclusion they claim to have demonstrated that the sales complained of "are saturated with actual and constructive fraud." From this it would appear that the argument which follows is made for the purpose of showing that the trial court erred in refusing to find fraud. Of course such an argument can have no legitimate place here.

Appellee aparently admits this in the beginning of his brief, when he relies only upon gross inadequacy of consideration and irregularities for relief.

Is this part of the argument then thrown in for stage effect only?

The first matter claimed as emphasizing the irregularities is, that appellee offered to amply repay appellant for all his time; pay him his money back and pay him a bonus of One Thousand Dollars besides. It is argued that because appellant refused to accept this that his conduct furnishes evidences of fraud. We contend that where the debtor has six months in which to redeem , this affords him abundant opportunity to pro-

tect himself against loss, and a purchaser's refusal after the redemption period to accept the money, furnishes no evidence of fraud.

By any other rule, negligence would be put at a premium. The debtor who is about to attack a sale as fraudulent, by neglecting to take advantage of his remedy at law by a statutory redemption would by reason of his very negligence be enabled to create additional evidence of fraud.

It might be otherwise where the law offered no opportunity to redeem, as in the case in 19 How. 310. Be that as it may, the trial court considered it for what it was worth as an evidence of fraud, and refused to set aside the sales as fraudulent.

On page 34 of appellee's brief, appellee argues that this offer to pay, as found by the trial court, is equivalent to a tender. Appellee quotes from our statutes, which says, "that an offer in writing to pay a particular sum of money, if refused, is equivalent to the actual tender of the money." Why this argument is made, we are at a loss to know. The finding nowhere discloses any written offer to pay this money.

Will this court supply the finding without evidence?

The Supreme Court of Utah construing that statute says "that it has no application to the case, unless made in good faith with ability to produce the money."

Hyams vs. Bamberger, 36 Pac. 202.

There is no finding of any ability to produce the money. Does appellee expect the Court to supply this fact also? This offer is not a tender, nor its equivalent. All findings concerning it are, therefore, entirely irrelevant and immaterial.

THE SECOND MATTER, EMPHASIZING IRREGULARITIES, (page 19.)

The court found (notwithstanding no issue was raised by the

pleadings as to this fact) that Stephens & Schroeder requested L. G. Hardy to bring suit against the appellee and that no attorney's fee would be charged. This finding is immaterial because outside of the issues.

It will be found by reference to the evidence that this action was not brought until March 12th, 1892 (p. 41 record). It will be noticed also, that the statement contained on top of page 20 of appellee's brief to the effect that appellant and others "were actually scheming to embarrass and break down the appellee so that his property might be the easier sacrificed," is only the finding of appellee's counsel, and not the finding of the Court. We apprehend that if from all the evidence it had appeared that this was the motive, then appellee would have had no difficulty In inducing the trial court to make a finding to that effect. The trial court having refused to find this act as having been done to embarrass and break down the appellee, we take it that this Court will not assume such fraudulent motive.

This Court must indulge in the presumption that it was not done from any wrong motive. It may have been that the relationship between Hardy and Stephens and Schroeder was such that the latter could with propriety offer to perform services for the former in settlement of some matters between them. There was evidence to that effect and the trial court probably acted upon the rule that "if there is left room for the inference of an honest intent the proof of fraud is wanting" (116 N. Y.. 418; 22 N. E. 1074) and refused to find a fraudulent intent. Will this court assume and supply the finding of such an intent?

THE THIRD MATTER, EMPHASIZING IRREGULARITIES, (p. 20.)

It is found by the trial court that on April 10th and April 24th (after the expiration of the redemption period), that the

plaintiff was ignorant of the execution sales, and that appellant permitted ..im to remain ignorant, and redeem lot 12, from a tax sale. The uncontradicted pleadings and findings of the Court (finding 28, page 19) show that on April 10th the appellee offered (not in writing nor tendered) to repay appellant if he would reconvey the "said properties" described in the complaint. We have already argued in our brief (p. 13) that these two findings are irreconcilable. We insist now that this finding is also immaterial, for the reason that all rights were fixed, and no estoppel could arise, and no fraud result from the silence at that time. (How violent the presumption that the findings are justified by the evidence is shown by an inspection of the uncontradicted evidence upon which this finding is based, as it appears on pp. 63-4 of the record. Notice the dates of redemption, and that redemption is by appellee's co-tenants. But we concede what appellee does not, that the findings must stand, and this goes only to the admissability of the evidence.)

Again we remind the Court that it is not found that Schroeder's silence was with a fraudulent intent and if it were not presumed therefore to have been done innocently, we might well point to the record to show that it was not done with a design to mislead. The evidence discloses that this information was conveyed to Schroeder by Van Cott, one of appellee's attorneys, who prior to the imparting of the information had told Schroeder that he represented the appellee' co-tenants (p. 26, record.)

Also prior to imparting the information the appellee had demanded a re-conveyance of the "said properties" (finding 28, p. 19, record). Schroeder therefore, had the right to believe that appellee knew of the sales, and that the tax redemptions were contemplated by appellee's co-tenants, (and in fact they were

made by them, though by the findings we must presume otherwise.) The record discloses and the law presumes that the silence on the part of Schroeder was not with the intent to mislead, and nowhere is found that the relationship of cause and effect existed between Schroeder's silence and any change of position by appellee. It is not found as in Graffam vs. Burgess, 117 U. S. 186, that the appellant had any knowledge of appellee's ignorance as to the sales. Will this Court, without all the evidence, presume to find fraudulent intent when the trial court did not find it?

We do not contend, as appellee represents us, that Schroeder's conduct should be decided by a single act, and we admit the law to be, that the court for the purpose of discovering fraud should look over the transactions as an entirety. The trial Court did this and gave appellee the widest latitude possible on the admission of evidence, and after hearing the entire case refused to find actual fraud, and failed to find facts from which the law will imply fraud. Will this Court reverse these findings?

THE FOURTH MATTER EMPHASIZING IRREGULARITIES, (p. 21.)

It is found that in December, '91, that Stephens told Young that he would not be pushed, and that the statutory time to redeem would not be insisted upon, and Young believed and relied upon such assurances; the finding does not disclose what day in December this conversation occurred.

This, together with plaintiff's testimony, upon which this finding is based (pages 43 to 45 of the record), conclusively show that this conversation was not the cause of appellee's failure to redeem. The trial court, therefore, refused to find that the relationship of cause and effect existed between this assurance and appellee's failure to redeem, even though he may have believed what was told him. See pp. 25 to 40, Appellant's Brief.)

By observing the finding based upon that testimony this Court will see how thoroughly the trial court was impressed with a sense of duty that the findings should be made the strongest possible under the evidence. When this Court appreciates that fact (as partially disclosed by a small part of the record which has been printed), we take it that you will feel under no obligation to enlarge upon the strained findings. The trial court refused to find that this assurance was made designedly to mislead, and refused to find that it did in fact cause a change of position. Will this Court supply these findings also? Without these allegations the complaint and findings are both insufficient as an attempt to charge fraud. Leffler vs. Field, 52 N. Y. 621. Will this court hold Schroeder responsible in fraud, for things done by another, and without his knowledge, when they are not found to have been fraudulent even as to that other?

Appellee at the outset argued that gross inadequacy and slight irregularity were sufficient to set aside the sales. Now, apparently, a change of front is taken, and it is claimed that there is actual fraud. We have discussed separately every irregularity, and every circumstance tending to prove fraud. We have attempted to show that the finding of gross inadequacy was the result of an error in not requiring the witnesses to take into account clouds upon the title affecting market value. We have shown that the officer followed the law to the hair line of legal strictness. We have shown that all the acts found and pointed as to as evidences of fraud, are presumed to have been done from good motives, because the trial court refused to find any other. Appellee complains that we have no right to examine these separate evidences of fraud separately, but that we must consider the transaction as an entirety.

Very well. Each separate act done in connection with the sales and with a fraudulent intent would tend to show fraud in the entire transaction. No number of separate acts, however many, done with an innocent purpose, taken either singly or collectively, can possibly prove fraudulent intent in the transaction as an entirety. The trial Court, doubtless, in refusing to set aside the sales as fraudulent, reasoned upon the matter as did the Supreme Court of Penn. in Mead vs. Convoe, 8 Atl. 379; 113 Pa. St. 220, where it is said:

"There are, of course, many small cricumstances in evidence which might be expected if there was a fraudulent purpose, but they were equally consistent with an innocent purpose, and hence do not, of themselves when taken singly or collectively, justify an inference of fraud. While fraud may be proved like any other fact, by evidence tending to establish its existence, yet it is a serious accusation, and it is not to be inferred." In Morton vs. Weaver, 99 Pa. 52, we said: "If we were to permit judgments and other judicial proceedings to be brushed aside, on naked allegations of fraud, and other flimsy pretexts, titles would indeed rest upon a very insecure foundation. It is not enough to charge fraud, and prove in support thereof, slight circumstances of suspicion only. To be of any avail it must be clearly proved."

Will this Court decide that the trial Court did not consider the case as a whole, or having considered it as a whole that error was committed in refusing to set aside the sales as fraudulent, and in refusing to find a fraudulent intent?

Counsel quote much and rely much upon Graffam vs. Burgess, 117 U. S. 186-7 as sustaining their case. In so far as it decides anything material in this case it clearly supports the contention of appellant. Both the opinions of the court and the dissenting opinion seem to agree that where there is a statute

providing for redemption that a failure on the part of the judgment debtor to avail himself of the statute must be excused.

In the dissenting opinion Justice Miller says that there was no evidence of such misconduct on the part of Graffam as afforded any ground in law or in equity to justify appellee in her failure to redeem. The majority of the Court held that "there was very material fraud sufficient to relieve complainant against the lapse of time." As to the matter found to be fraud the Court says:

"He (Graffam) knew she was ignorant of the sale, and of the position in which the sale placed her. He stood by and saw her expending large sums of money ($1,200, when the judgment and costs were but $200) in total unconsciousness of his proceedings, and of the means of injuring her which he held in his hands * * * * * and keeping spies to watch her proceedings, and to find a favorable opportunity of clandestinely slipping into the premises in her absence. If this is not fraud we should have great difficulty in defining what fraud is."

The court distinguishes that case so as to make the general rule that silence under those circumstances is no fraud inapplicable by saying that "It is a principle of law as well as of natural justice that greater consideration and care are due to persons known to be unable to take care of themselves, than those who are fully able to do so. * * * * * In dealing with a man whose rights without his knowledge, but which by due dilligence he might know, are passing away by lapse of time into another's hands, the latter may, perhaps, justify himself in the eye of the law, although not in conscience, in preserving a wary and crafty silence so as to put his victim off his guard, and bring him into his own power; while he would be perfectly inexcusable in taking such advantage of a woman, unskilled in business, and unused to the strategems which are sometimes resorted to by unscrupulous persons."

Now let us examine the facts in this case. The judgment debtor knew that a judgment had been rendered against him, that an execution had been issued, and his property advertised for sale. He requested and received a postponement of the sale in order to raise the money, but did not succeed in doing so; knew when it was to be sold, but did not attend the sale, nor have anybody attend it for him. (p. 43, record.)

He knew what his rights were or at least could easily determine, because he had a copy of the statutes in his possession, and knew how to find every provision in it. (p. 45 record).

He made no improvements, nor altered his position in the least, during the redemption period, by reason of any silence or any thing done by appellants, and at its expiration voluntarily gave up possession and allowed appellants to collect the rents. Is this case then to be made an exception to the rule as was Graffam vs. Burgess?

Graffam vs. Burgess can shed no light on the main question in this case as to whether or not there is here offered a sufficient excuse for appellee's failure to redeem.

In Byers vs. Surget also much relied upon by appellee, there was actual fraud in procuring the judgment, and in the sale under it, and there it was set aside as fraudulent and void.

We are not surprised from the statement of facts made by the Court that the Court should have used the language which is quoted. In the case at bar the Court refused to find fraud, and refused to set aside the sales as fraudulent and void. Byers vs. Surgent was decided under state statutes making no provision for redemption. That case has no application here in any particular, and certainly gives no help upon the question as to whether or not a sufficient excuse is offered for a failure to redeem during the statutory redemption period.

Counsel for appellee has quoted much from the argument, and from the invective used by the Court in the two cases last referred to. He has assumed that the facts in those cases are similar to the one at bar, and then make the remarkable announcement that "the reading of those opinions will show that the sales we complain of are fraudulent."

How could the reading of those opinions supply a finding of fact, and modify the decree of the trial court so as to set aside the sales as fraudulent?

After this (p. 26) counsel makes what we might term in his own language a "heterogeneous citation of authorities" which are without application here.

The first case cited is decided without reference to the statute providing for redemption.

The second we have already distinguished in the beginning of this reply.

The third we have distinguished at least twice in our opening argument. (p. 39 and on p. 9 review of decisions of the Supreme Court of Utah.)

The fourth case holds just what we are contending for, namely: That the debtor must excuse his failure to apply for relief during the redemption period and sheds no light upon the question as to whether or not the excuse offered in this case is sufficient.

The section from Freeman which is cited, contains nothing which is inconsistent with our argument in the opening brief, and especially does it contain nothing which is inconsistent with that part of our argument from pages 25 to 48 of our brief.

The next case (28 Am. Dec. 236) was upon the motion to set aside, and sheds no light upon the question as to whether or not appellee has offered a sufficient excuse for his failure to apply

for relief before the expiration of the statutory period. Neither does it shed any light upon the question as to whether the Court can grant relief in this action without the finding of actual fraud.

The last case cited has no application, because the decision is made without reference to a period of redemption, and thus ends the appellee's argument.

Appellee's reply to our brief is remarkable, only for the reply which it makes to imaginary arguments, and for the matters left unanswered.

It is untrue that appellant cited no case on the question of redemption where there was a concurrence of gross irregularity, and gross inadequacy. Among the many cases cited, we desire to call special attention to the latest decision upon this subject.

Powers vs. Larabee, 57 N. W. 791.

In that action seventeen hundred acres of land, composed of eleven distinct tracts, and worth $6,800, were sold, without even an attempt to sell any of the eleven distinct tracts separately, for the nominal sum of ($96) ninety-six dollars. No one bid at the sale except the judgment creditor. This then is a case of undisputed irregularity, and of shocking inadequacy, in which the judgment creditor was the only bidder at the sale. The court, in a well reasoned opinion covering many pages, decided as we believe every question which it is neccessary to decide in this case, except one, viz: Was appellant by fraud of the appellee deprived of his right of redemption? We therefore specially invite the court's attention to that opinion.

By his negligence the appellee waived each separate irregularity and necessarily waived them collectively also. By the same negligence he likewise waived the gross inadequacy.

Campau vs. Godfrey, 100 Am. Dec., 143;

Thus we again come back to the main question. Was the appellant deprived of his right of redemption by fraud of the appellee? If so he can recover without the irregularity; if not he must fail even with irregularity. This is the principal question in this case, as we see it, and upon this question neither the complaint nor findings are sufficient to warrant a judgment for appellee (p. 25 to 40 of appellee's brief).

Appellee complainingly states the fact that we ask to have certain findings disregarded. His statement would have carried more weight, if he had explained how it can be presumed that a fair trial has been had when the defendant comes prepared to try an issue made by the pleadings and finds when the court renders judgment that the plaintiff and the court have been incidentally trying some other issues of which he had no notice. Why did not appellee give some reason why findings made upon questions outside of the isues should be considered material? Why should this court presume that a fair trial was had upon such issue?

The appellee asserts without giving any reason, that the ninth finding to the effect that the parts of lot two in question, are one parcel of land, and the twenty-third finding that the parts are held in different estates are not contradictory. We again remind the court that no issue was raised by the pleadings as to whether or not the several parts of lot two were in fact one parcel.

The map in the record and which is made a part of the findings, (find. 9 p. 17 record, map at p. 47 record,) show also that an alley runs through these parts of lot two. If counsel had explained how tracts of land on opposite sides of an alley, held in different estates, and from different sources of title can by any possibility be one single parcel his assertion would have been

more effective. We ask this court to decide this question, if it is considered material, and not do as the Supreme Court of Utah did, assume it to be an uncontroverted fact in the case. We ask this court in deciding this question to explain why we should be bound by the ninth finding when it is not based upon any allegation in the complaint.

Appellee asserts that the twenty-eighth and thirtieth findings are not contradictory because he asserts that the word "properties" refers to the different sales of lot two and does not refer to lot twelve.

We again invite attention to the pleadings and to the findings which say "said properties," and we assert without fear of truthful contradiction that nothing in the pleadings indicates any intention to limit these words to anything less than all the properties. It must therefore be construed to refer to all the "said properties" described in the findings, and complaint, notwithstanding, the desires of the appellee's attorney.

Appellee asserts that the tenth and fifteenth findings are not contradictory, and asserts that the fifteenth is that it was the intention of Stephens to obtain all appellee's property.

We assert that no such intention is found in the fifteenth finding, and that it only finds an intention on the part of Stephens to bid in a particular manner at the various sales, so that he would leave a balance after each, so that all of plaintiff's property would be sold. We re-affirm our conviction, that a man can have no intention to bid in a particular manner upon property which he does not know to exist. If it had been Stephens' intention, before any sale was had, to obtain all of his property, then why did Stephens at the first sale bid in property for John Clark?

On page 18 of our brief we argued that by reason of the recording act as well as by reason of appellee's knowledge that

his property had been levied upon and was being advertised for sale, that he must be presumed to have knowledge of all irregularities and subsequent proceedings, and to this effect we cited a large number of authorities. Certainly in the absence of a finding to the contrary, the presumption of law must prevail. The appellee on page 29 of his brief, mistaking assertion for argument, denies that appellee had any knowledge of the irregularities complained of. It will be noticed that appellee does not controvert our statement that he is presumed to have knowledge as a matter of law. Neither does he point out any finding of fact concerning his ignorance of irregularities. It would seem therefore that appellee's counsel is putting himself upon the witness stand and testifying instead of arguing.

Learned counsel for appellee can not have meant what he said when he asserts on p. 29 that the court "expressly" found that fraudulent intent existed in its full maturity. What he meant to say doubtless was, that by the finding designated, the court found facts from which he infers a fraudulent intent, but which in fact are equally consistent with an honest intent, and which were insufficient to convince the trial court of the existence of a fraudulent intent. If it were true as is asserted by appellee that the court "expressly" found a fradulent intent, why did not he point out the "express" reference to such an intent? Why did not the court decree the sales fradulent?

We argued (on p. 16 brief) that "fraudulent intent must be charged in terms, and not left to inference from facts stated," Bartholomew vs. Brutley, 15 Ohio St. 659—45 Am. Dec. 596; also that the "refusal of the court to (thus) find actual fraud in the sales is a finding against the plaintiff upon whom the burden to show fraud rested.

Elliot App. Proc. Sec. 757, p. 712, and cases, also Young vs. Berger, 32 N. E., 318, 132 Ind., 530, Smith vs. James, 30 N. E., 903.

We also argued (p. 17 and 19) that as appellee has elected between two inconsistent remedies to rely upon fraud, he is bound by his election and cannot recover, except for fraud.

We argued (p. 26 to 28) that no estoppel can be created, nor a fraud committed without the knowledge or participation of the person to be estopped, or charged with the fraud. All these propositions are uncontroverted. The plaintiff must, and we can with safety, rest our case upon the sole question as to whether actual fraud upon the part of the appellant is expressly found. In reply to appellee's assertion that the fraudulent intent is expressly found, we invite the court to read the finding, remembering that the uncontroverted rule is that fraudulent intent must be charged in terms, and not left to inference from facts stated; and that the refusal of the court to find expressly the fraudulent intent is a finding against the appellee upon whom the burden to show fraud rested.

Appellee argues that the testimony of Young to the effect that Stephens had given assurance that he would not be pushed, is admissable under the rule laid down in 2 Freeman on Execution, Sec. 316, where it is said that a court of equity will not extend the period of redemption "except under special circumstances, showing that a fraud would otherwise have been perpetrated upon the defendant." That is good law, but has no application here, because no fraud will be perpetrated by refusing to extend the redemption period. Appellee's failure to redeem is not the result of any fraud, but only the result of his own negligence, from the consequences of which he can have no relief.

We (on p. 25 to 40 of our brief) laid down the following propositions:

FIRST. That this finding was not sufficient as a finding of fraud, by which plaintiff was deprived of his right of redemption, because Schroeder is not connected with it, and fraud cannot be committed by an unauthorized proxy, nor can any man bind his co-tenant without authority.

Jackson vs. Bartlett, 8 John (N. Y.) 361; Freeman on Co-tenancy, Sec. 168-170; Mahoney vs. Van Winkle, 21 Cal. 582; 1 Bigelow on Frauds, 211.

SECOND. The finding is insufficient as a finding of fraud by which the appellee was deprived of his right of redemption, because the relationship of cause and effect does not exist between the alleged fraud, and his failure to redeem. It makes no difference that he believed the assurances, if the belief induced no change of position.

1 Bigelow on Frauds, 115, and cases; Lefler vs. Field, 52 N. Y. 621; Guichard vs. Brande, 57 Wisc. 534; 15 N. W., 764; Ketchum vs. Duncan, 96 U. S. 659. See also other cases cited on page 30 of our brief.

THIRD. The finding is insufficient as a finding of fraud by which plaintiff was deprived of his right of redemption, for the reason that it is not found that the representation designedly induced appellee to forego redemption.

Lefler vs. Field, 52 N. Y. 621; Union Life Insurance Co. vs. Mowry, 6 Otto 549; 24 Co-op. Ed. 927.

FOURTH. The finding is insufficient as a finding of fraud; or to create an estoppel by waiver against the appellee, because not in writing, and therefore appellee could not have relied upon it. See quotations from Utah Statutes on page 33 of our brief.

We might add also that plaintiff's complaint is insufficient in its attempt to allege fraud as an excuse for not redeeming in this that it does not allege that Stephens' assurance was given with fradulent intent and that it did actually mislead appellee to his injury.

Lefler vs. Field, 52 N. Y. 621.

These propositions, except the fourth, have all been left uncontroverted by the appellee, and we leave it for the Court to say whether they are applicable to the facts in this case.

Again appellee cites Blight's Heirs vs. Tobin, 18 Am. Dec. 219, in support of their proposition that Schroeder was bound by Stephens' assurance.

That case has nothing in it in conflict with the principles and decisions cited by us above, and has no application here. In that case one of the partners, who were the attorneys for the judgment creditor, had been employed also by the judgment debtor for the purpose of protecting the very property which he purchased on the execution, against his own client. The law is that the employment of one member of a law firm is the employment of all members.

1 Bates on Partnership, Sec. 437, p. 452.

All members of the partnership were therefore attorneys for the judgment debtor for the purpose of protecting the particular piece of property, which they purchased. No one questions the law, that under those circumstanses the judgment debtor had the right to demand that the property thus purchased by his own attorneys should be held for his benefit. In that case there was actual fraud prior to the sale, and constructive fraud resulting out of the trust relationship between the purchasers and their client, the judgment debtor.

No one controverts the rule that the trust relationship created by the professional employment of one member of the firm, and his client, would bind all members of the firm in their relationship with the same client. This is not in conflict with the doctrine that a purchaser at an execution sale cannot be affected by anything occurring after the sale, to which he is not a party.

Replying to the claim that Van Cott's testimony in regard to the redemption of lot 12 from a tax sale was competent evidence, we invite the Court's attention to the tax receipts as they appear on pages 63-4 of the Record, and which are part of Van Cott's testimony, and which show conclusively that the redemption of this property was by Van Cott as agent for the co-tenants, of the appellee, and not by the appellee himself. Van Cott nowhere testified that he redeemed for the appellee. His conversation as to redemption by co-tenants cannot be material for any purpose. We re-affirm our conviction in this matter, that even if the redemption had been by the appellee, that still silence under the circumstances, would not have been fraud, or evidence of it, especially where appellant did not know of appellee's ignorance, and had reason to believe that he knew his right.

And we now come to another illustration of the adroit manner in which appellee answers imaginary arguments, and leaves unanswered our argument upon the real matter of contention. Upon page 41 of our brief we argued that the appellee's allegation as to the extent of his ownership in the property in question, was immaterial, because the allegations of fraud, irregularity or inadequacy would not be impaired by the striking out of that allegation. We quoted the statute, and the decisions under it, which expressly say that a failure to deny such an allegation is not an admission of its truth. Appellee, instead of answering that argument, studiously avoids reference to it, and pretends to be-

lieve that we argued that the allegation of ownership was insufficient in form. We admit that an allegation that plaintiff "is the owner" is equivalent to an allegation of seizin in fee. The fact that the allegation is sufficient in form is no answer to our argument that it is immaterial. Neither is it an answer to our objection that one may admit another to be seized in fee of premises, and yet not admit thereby that his title is free from cloud such as would effect the market value, market value being the issue.

Why did not appellee answer these propositions instead of an imaginary one?

We also invite the Court to an inspection of the Record, pages 28 and 29. It does not appear that appellee's interest had a market value. Neither is market value asked for. The witnesses are asked for "an estimate of what was the value" of appellee's interest, and "what would you estimate to be the reasonable value," etc.

The witnesses do not testify that the appellee's interest has a market value, nor do they testify that they know what the market value is.

The witnesses give THEIR ESTIMATE of value, and not their opinion of the market value, and the Court held that evidence admissable, and made a finding of market value thereon.

A witness with western boom ideas might "estimate" property to be worth $40,000 which he would be compelled to admit would nat bring $20,000 in the open market. It would simply be a case in which his estimate of value was above the market value.

A reading of the testimony of these witnesses (on p. 31 of Record) must raise a strong suspicion that appellee's peculiar interest in this property had no market value, or that these wit-

nesses did not know what it was. They were asked for and gave in evidence their "estimate" of value as distinguished from market value. Upon this evidence of "estimated value" the Court made a finding of market value (finding 25, p. 19, record.) We submit that the witnesses' estimate of value is no evidence of market value.

On pages 43 and 44 of our brief we attempted to show that there were clouds upon appellee's title to the parts of lot 2, by showing that the Mayor's deed, issued August 8th, 1873, under the town site act, to the heirs of John Young, deceased, was upon an adjudication which is conclusive upon all the world, by Rogers vs. Thompson, 9 Utah 36; 33 Pac. 235.

In reply to this appellee contends that the Probate Court has the authority to distribute decedents' estates, and that its decrees have the effect and presumption of Courts of record, and that the time for appeal from the decree of February, 1890, has expired. Also that the decree is conclusive as to the rights of heirs, legatees, OR devisees, subject only to be reversed or set aside on appeal. All of this we admit, but it does not follow therefrom that the Probate Court by a decree of distribution can destroy a title already existing, or create a new title.

The uniform construction of the statute which appellee quotes, is that the decree is binding upon heirs, legatees or devises only in so far as they claim in those several capacities and in no other, and creates no new title.

Cheevers vs. Ching, 82 Cal. 68; 22 Pac. 1081.

This case also holds that the validity and effect of contracts, conveyances (and by analogy judgments) cannot be altered by a subsequent decree of distribution, because the latter declares only the title accruing under the will, without reference to any question as to ownership from other sources of title. This propo-

sition appellee has left uncontroverted. How then are the heirs of John Young, who are the grantees in the Mayor's deed, divested of their title by a decree of distribution made after 17 years of ownership, especially when the Probate Court had no equity jurisdiction, (Sup. to the Rev. Stat. U. S., p. 570, Sec. 12) and had no power to create new titles. 82 Cal. 68.

Again appellee has argued a matter over which there is no controversy, and has left untouched the real question at issue, which is, did the Mayor's deed in 1873 convey this property to the heirs of John Young, six in number, and if so, how could the decree of distribution made thereafter divest them of it? Upon these two questions appellee is wisely silent.

Appellee argues that the title is good, because actions for realty are barred in 7 years. He does not controvert our position that co-tenants cannot hold adversely to each other. The heirs of John Young, deceased, include the devisees and distributees in the decree of distribution of 1890, and they are therefore co-tenants of appellee.

How then is appellee's title better now than it was in 1873, when it is admitted that co-tenants cannot hold adversely to each other? Even independent of this, where is there any evidence that even the co-tenants have been pretending to hold adversely?

On page 33 of appellee's brief he quotes from the decree of distribution the description of the part of lot 2 which is distributed, and confirms our assertion that the appellant received no interest under the will in the west one rod by 20 rods of the tract described in the map made a part of the findings, and this controverts appellee's assertion that his title to the one rod is derived from the will of John Young, deceased.

The claim of appellee's counsel (p. 31) that there was no cloud upon the title which would affect market value is hardly

reconcilable with appellee's own testimony (of top p. 31 of record) to the effect that the reason he did not raise the money necessary to redeem by giving a mortgage on the property was because of the existence of a cloud on the title to a part of the property on the west side of Plum Alley. If this cloud prevented his securing a mortgage loan on the property, did it not affect the market value?

On page 35 of appellee's brief, and in order "To avoid this Court being mislead" he invites the attention of the Court to a part of the evidence bearing upon some of the findings. We understand the rule to be that this Court will treat the findings as conclusive upon all issues raised by the pleadings. We regret this rule of the law, but submit.

Next it is charged that we have made an unjustifiable attack upon the Chief Justice and the Supreme Court of Utah. We deny the making of any charge, except to assert and give some reason therefor, that the gentlemen who have the good fortune to occupy those judicial positions have not become infallible. We have simply asserted in plain English just what is implied in every appeal, to-wit: That the Court erred. We believe their opinion shows that the error has resulted from three causes. (1) The ignoring of material facts. (2) the mis-stating of material facts. (3) Assuming as undisputed facts, matters which they should have decided.

Of course the appellee had the right to buy his peace as is suggested in the argument of appellant, page 35. This, however, is no answer to our argument, that his conduct in so doing was an election between inconsistent remedies. "Buying his peace" was only one method of many, by which he could manifest that election.

We argued, that it was a principle of law that the appellee

should seek relief by motion during the redemption ueriod, and if he does not that he can have no rights in a Court of equity, unless he excuses his negligence.

To this appellee replies that it is hard to see how the appellant can be damaged whether relief is sought by motion or in equity, and that if appellee is entitled to relief it must be immaterial to us how it is obtained. This does not answer our argument. We say that he is not entitled to relief, unless he applies within the time, and in the manner provided by law, and this proposition is not answered by saying that appellant is not damaged by the illegal methods pursued.

Appellee's argument would require the Court to ignore a plea of the statute of limitations, because it is hard to see how any one is damaged by ignoring it. This logic would also require the Court to enforce a judgment by a bishop's court in Utah, if the appellant was not "damaged" by its decision.

We concede what is said by the authorities cited on page 36 of the appellant's brief, that an action in equity may be commenced after the expiration of the redemption period, with this limitation, however, that he first excuse his failure to avail himself of the legal remedy by redemption, and set up facts bringing the action within the scope of some of the well recognized heads of equity jurisdiction. This we claim has not been done.

We argued in our brief that the Court could not in one action set aside four different deeds given pursuant to four separate sales under two different executions. Appellee claims that this is justifiable, because the property obtained was by a series of fraudulent acts brought about by an antecedent determination, and that one action thereon was properly brought.

We do not believe that the section of Pomeroy cited warrants the conclusions drawn from it. There are here separate and

distinct primary rights in different tracts of land, some situated at a great distance from others. These separate and distinct rights have been invaded, if at all, by separate and distinct wrongs. It follows, therefore, that separate actions must be brought for redress against the separate wrongs which invaded separate primary rights. Even if there were a single primary right invaded by separate and distinct wrongs, then separate causes of action would result.

Pom. on Rem. and Rem. Rights, Sec. 456.

A common intent, even if such had been found, could not unite several and distinct wrongs, even though committed for the accomplishment of similar purposes. It seems to us that the appellee by giving a single justification for the mingling of the several wrongs into one cause of action, viz: That the wrongs were the result of an antecedent fraudulent intent, thereby admits that the several sales cannot be set aside in one action, unless, the Court did find upon proper pleadings that such antecedent fraudulent intent existed. It is neither charged in the complaint, nor found in the findings that such an antecedent fraudulent intent existed either in Stephens or appellant. The judgment is therefore erroneous.

Admitting what appellee says to the effect that the matter of taxing costs was in the discretion of the trial court, we still insist that the discretion was abused both upon reason and authority.

Byers vs. Fowler, 12 Ark. 218; 54 Am. Dec. 271.

Appellee argues that the Court in the accounting was justified in reducing the interest on the judgment to the legal rate, because of making the offer to pay. They claim that this offer was the equivalent of a tender. Again we say that this is not

true, because the offer was not made in writing; neither was the offer accompanied with ability to produce the money, nor was there any money brought into court. The appellee in his complaint simply offered in general terms to do equity.

We argued that the Court erred in adjudging that the appellee should not be required to pay interest on the amount found due in the accounting from the day of the tender.

Replying to that argument appellee says that it was no injury, because we had the right to take the money. We believe that the spirit which prompted him to make this argument, also prompted the Court to make such a decree. This was one method of prescribing a penalty to deter Schroeder from appealing. The ordinary rule of law is, that one holding trust moneys of this sort should not be relieved from the payment of interest, except upon proof that he actually has, and does hold the money and is thereby deprived of its use. If appellee had been required to pay the money into court, and thus put it beyond his control, there could have been no error if the appellant did not receive interest. The appellee should not be permitted to profit out of appellant's appeal. If he does not actually have in his possession the money which he is required to pay, and if he only makes some arrangements with some friends or banker by which he can get the money upon request, he would in no way be deprived of the use of the amount of money found due from him to appellant. If he is not deprived of the use of the money, then surely he should pay legal interest thereon to appellant. No reason can be given for a judgment of this sort, where the money is not kept in actual idleness, excepting that it is a proper means of coercing the defendant to forego his right of appeal.

The liability for interest should depend upon the fact as to whether or not appellee has actually held and kept this money in

idleness pending this appeal, and should not be made to depend upon the defendant's desire for an appeal. The decree should have relieved him from liability only on payment of money into court.

We see nothing inconsistent in the two propositions which we argued to the effect that in this action no relief could be had except to set aside the sales as fraudulent and void, and second, if the Court differs with us on this proposition of law, and allows the redemption, then that redemption must be in accordance with the statute, and should require the payment of the statutory penalty.

The mental vision of appellee's counsel is more refined than our own if he can see any inconsistency in our discussing these two propositions. The appellee's deed to his attorneys, even if it be a mortgage, is still objectionable, because by the agreement the fees of appellee's counsel are contingent upon success.

The rest of appellee's brief is devoted to a little tongue lashing which will be applicable to this Court, if it should disagree with appellee's counsel. This Court is warned that if they should disagree with him, that they will be committing "an offence against justice, and a disgrace to its administration."

In conclusion we desire to say that we tried to show that the finding of gross inadequacy was arrived at by erroneously refusing to take into consideration clouds upon the title affecting market value.

We have tried to show that there was no irregularity, and that the officer followed the law to the hair line of legal strictness. But, suppose we are wrong and that there have been some irregularities, what is the effect? As we have shown if there is a valid extension of the redemption period, the appellee in a proper action should be permitted to redeem without showing irregu-

larity, gross inadequacy, fraud, or anything else. If there is no such an extension of the redemption period, that irregularities become immaterial.

If each separate irregularity is waived by a failure to apply for relief during the redemption period, then they have been waived collectively. No number of irregularities not making the sale void can have the effect of extending the redemption period, as has been shown by the numerous authorities cited. The same is true of gross inadequacy. If neither irregularity nor gross inadequacy separately can extend the time within which the sale should be attacked, for that reason, then, their force is not increased by the concurrence of both. Gross inadequacy and irregularities are merely circumstances of evidence tending to prove fraud. We repeat again that in this case the evidence was not sufficient to convince the minds of the trial court of the existenec of fraud, and this court cannot infer its existence. Irregularities, even if they did exist, are not even evidence of fraud, when, as in the case at bar, the proper course of procedure is so hedged about by difficulties and doubts, that even lawyers would disagree as to the proper course to pursue.

It cannot be said under the circumstances of this case, even if the Court should find that iregularities exist, that those irregularities are such a deviation from any plain rule of action as warrant an inference of bad faith on the part of the officer. If this Court should conclude that between doubtful methods, the wrong one was selected, we take it that you must still agree with the trial court, which seems to have argued that the deviation of the officer was not such a plain violation of duty as to warrant an inference of bad faith.

We desire to give in a very brief summary, the reason why

we believe this case should be reversed, with directions to render a judgment for the appellant on the findings.

This is an action in which it is sought, after the expiration of the redemptoin period, to set aside several execution sales as fraudulent and void. There is no finding of any fact from which the court can infer a legal fraud. Fraudulent intent must be charged in terms, and expressly found. The failure to make such a finding is a finding against the plaintiff, upon whom the burden to show fraud rested. No such fraudulent intent is found. There is, therefore, neither fraud in law, nor fraud in fact, and the trial court rightfully refused to set aside the sales as fraudulent and void. The trial court, however, permitted the plaintiff to redeem, and this court is called upon to decide whether or not that judgment is justified by the pleadings and the findings.

Appellee's counsel contends that the judgment is justified, because there are irregularities, coupled with gross inadequacy of consideration.

The plaintiff's testimony is substantially as follows: He knew that judgment had been rendered against him. He did not offer to pay the money, or any part of it. He expected the execution to be issued, and knew the United States marshal had levied upon his property and advertised it for sale. The sale was postponed at his request, in order that he might pay the judgment; he had no reason to expect a further postponement, and did expect the judgment creditor to collect its money. This is the plaintiff's own testimony. He must, therefore, be presumed to have knowledge of all the irregularities, inadequacy, etc., etc.

Vigereaux vs. Murphy, 54 Cal., 346; Raymond vs. Holborn, 23 Wisc., 58; 99 Am. Dec., 107; Raymond vs. Pauli, 21 Wisc., 538; Greenup vs. Stoker,

12 Ill., 24; Boyle vs. Ellis, 11 Ia., 97; Fergus vs. Woodworth, 44 Ill., 380; Cunningham vs. Felker, 26 Ia., 117.

If iregularities existed (which is denied), they are severally and collectively waived by the fact that the appellee, with knowledge of them, made no attack upon the sales during the redemption period.

Power vs. Larabee, 57 N. W., 791; Campau vs. Godfrey, 101 Am. Dec. 143.

Gross adequacy alone can never justify relief, especially when there is a redemption period.

This action was brought on the ground of fraud. Relief must, therefore, be granted for fraud or not at all.

The gross inadequacy and the irregularities, if any existed, were admissable in evidence, as tending to prove, with other circumstances, fraud in the sales on the part of the officer or purshaser. The trial court considered them for what they were worth as evidences of fraud, and refused to decree the sales fraudulent. For every other purpose except as evidences of fraud, they are immaterial in this action.

Courts of equity will extend the redemption period only to avoid the consummation of a fraud.

If the appellee was deprived of his right of redemption by appellant's fraud, then the appellee was rightfully permitted to redeem, even though no irregularities exist. If there was no fraud on the part of the appellant by which the appellee was deprived of his right of redemption, and no enforcible contract extending it, then this judgment must be reversed. Appellee having brought his action in fraud, cannot recover upon any other ground, and irregularities, etc., become immaterial.

The Court found that the appellee did not know who the purchaser was until after the redemption period. During the redemption period , Stephens, of the firm of Stephens & Schroeder, attorneys for the judgment creditor, and who were purchasers at all but one of the sales, assured appellee that he would not be pushed, and that the statutory period of redemption would not be insisted upon. It is also found that appellee believed and relied upon such assurance. These findings, appellee contends, justified the Court in extending the redemption period.

The Court will relieve a debtor against laches in not availing himself of his right of redemption, in every case where a fraud would be consummated, if relief is denied. The real question is then, was appellee defrauded of his right of redemption by the facts above found?

Fraudulent intent must be expressly charged, and not left to inference from facts stated.

Bartholomew vs. Bently, 45 Am. Dec., 596; Lefler vs. Field, 52 N. Y., 621.

A failure to find fraud is a finding against the appellee upon whom the burden to prove it rested.

Elliott App. Proc., sec. 757, p. 712; Smith vs. James, 30 N. E., 903; Young vs. Berger, 32 N. E., 318.

The findings referred to and the complaint, are both insufficient as allegations of fraud by which appellee was deprived of his right of redemption.

First, because no fraudulent intent is charged.

Lefler vs. Field, 52 N. Y., 621; Union Life vs. Mowry, 6 Otto, 529, and cases cited on p. 31 of brief.

Second, a purchaser at an execution sale cannot be affected

by anything occurring after the sale to which he is not a party.

Jackson vs. Bartlet, 8 John (N. Y.), 361.

One co-tenant cannot by fraud or estoppel affect the rights of his co-tenant.

Freeman on Co-Ten., sec. 168, p. 245-sec. 170 p. 250; Bigelow on Frauds, 211; Mahoney vs. Van Winkle, 21 Cal., 582.

A third reason why this finding is not sufficient as a finding of fraud by which appellee will lose his right of redemption, unless extended by the Court, is that the relationship of cause and effect does not exist between the representation and the failure to redeem.

Bigelow on Fraud, 115 and cases; Leffler vs. Field, 52 N. Y., 621, and numerous cases cited on p. 29 and 30 of brief.

There is, therefore, no fraud sufficient to excuse appellee's laches in not availing himself of his remedy at law by redemption or motion to vacate during the redemption period, and the case should be reversed, with instructions to render judgment against appellee on the findings.

If this Court does not agree with appellant's logic as stated in the summary above, this judgment should still be reversed for the numerous errors assigned, unless the disagreement of the Court is put upon the ground that actual fraud is found by which appellee was deprived of his redemption.

We submit herewith a summary of the questions which it may become the duty of the Court to decide, and the logical order in which we believe they arise.

I. Is it necessary that a fraudulent intent should be charged

in terms and expressly found, and not left to inference from facts stated?

II. Is there a fraudulent intent expressly found, and charged in terms in this case?

III. Has the appellee not waived his right to rely upon fraud by electing, before the commencement of this aciton, to rely on his right of redemption?

IV. If fraud is not found, or has been waived, can the Court in an action to set aside sales as fradulent and void, grant relief for gross inadequacy and irregularity?

V. If so, are there any irregularities, and what are they? Each sale must stand on its own merits.

VI. Did the Court err in the admission of testimony as to "estimated" value?

VII. Is it not necessary to the granting of relief, that there should be a finding of fact, charging that in each sale the relation of cause and effect existed between some irregularity and the inadequacy?

VIII. Is it not also necessary to the granting of relief that the appellant should, by the findings, be charged with having caused both the irregularity and the inadequacy?

IX. Did not the appellee, prior to the commencement of this suit, waive all irregularity by (a) having knowledge of the advertisement and manner of sale, and therefore, all irregularities, without taking any step to prevent the sale, and by (b) his failure to make a motion during the redemption period to set aside the sale, and by (c) his election to rely upon his right of redemption as evidenced (1) by his conversation with Stephens; (2) by his

remaining quiet and making no objection at the sale on account of irregularity; (3) his demand for a reconveyance and redemption after the redemption period; (4) his voluntary giving up possession after the redemption period?

X. If the irregularities are not waived, then can an action be maintained after the expiration of the redemption period, without excusing the failure to apply for relief before its expiration?

XI. If not, then is there in this case a sufficient excuse offered? In order to decide the last question, the Court must determine whether or not a fraud would be committed if the Court did not extend the redemption period. This again depends upon these questions: (1) Can a fraud be committed by appellant's co-tenants without the knowledge of appellant, which will bind him? (2) Can it be that the assurance of Stephens would work a fraud if the redemption period were not extended, when there is no finding that the relationship of cause and effect exists between that assurance and the appellee's failure to redeem? (3) Can there be a fraud in this connection, when the trial court did not find that the assurance was given by Stephens designedly to mislead?

XII. Did the Court err in holding that appellee was, by the pleadings, estopped from proving clouds upon the title as affecting market value?

XIII. Did the Court err in holding that Schroeder would be effected by a conversation had after the sale, between his co-tenant and appellee, and was it proper to admit that conversation in evidence?

XIV. Did the Court err in permittnig Van Cott to testify to a conversation concerning redemption from a tax sale, and

Schroeder's silence, when it is not claimed that Schroeder knew of appellee's ignorance of the sales, Schroeder having reason to believe that appellee did know of the sales, because he had already demanded a re-conveyance of the property sold?

XV. Did not the Court make contradictory findings, as well as findings outside of the pleadings, and is this not error?

XVI. Did not the Court err in taxing costs against appellant?

Feeling confident of a reversal, I herewith submit this cause.

A. T. SCHROEDER.